A Law Unto Themselves?
Australian Regulation of Forestry Operations

by

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Submitted in fulfilment of the requirements for the degree of Doctor of Philosophy,

Faculty of Law, University of Tasmania, Hobart (November 2014)

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Abstract

This thesis critically examines federal environmental regulation of Australian forestry operations, particularly the effective exclusion of forestry operations in regional forest agreement [RFA] regions from Australia's omnibus environmental statute, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) [EPBC Act]. The thesis tests the official rationale for this exclusionary policy, termed 'RFA exceptionalism', and where it leaves Australia's compliance with key international environmental treaty obligations.

Australia's federal and State Governments and industry have asserted that RFAs (governed by the *Regional Forest Agreement Act 2002* (Cth)) provide equivalent environmental protection to that of the EPBC Act. Therefore, they say, forestry operations undertaken in RFA regions do not require assessment under the EPBC Act. This thesis tests this justification for RFA exceptionalism, a policy embedded in both the EPBC Act and RFA Act. In particular, it assesses the Tasmanian RFA's legal protection against two key objects of the EPBC Act (with equivalent goals in Australia's National Forest Policy Statement 1992), to:

- 'provide for the protection of the environment, especially … matters of national environmental significance';[i] and
- 'assist in the co-operative implementation of Australia's international environmental responsibilities'.[ii]

The schemes of the EPBC Act (applicable to all other industries which significantly impact matters of national environmental significance) and RFA Act are examined in Chapters 2 and 3 respectively. Research questions and hypotheses are then developed to test the Tasmanian RFA against the above two statutory aims.

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[i] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s3(1)(a).
[ii] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s3(1)(e).

Chapters 5-7 test the hypotheses, using prominent Tasmanian case studies to examine federal legal protection from forestry operations afforded to places of outstanding universal value deserving World Heritage listing; and threatened species. The case studies demonstrate, inter alia, the amendment of federal and State statutes and the Tasmanian RFA ('shifting the goalposts') to defeat environmental litigation (evidenced by subsequent judicial decisions examined in Chapters 6 and 7).

The thesis proves that RFAs do not, as claimed, provide equivalent legal protection to the EPBC Act. Accordingly, that claimed justification for excluding RFA forestry operations from the EPBC Act is a false premise.

Moreover, the Australian Government has, through the RFA regime, largely abandoned the regulatory playing field – effectively leaving forestry regulation to the States. In so doing the Australian Government has abdicated its responsibility to ensure that Australia fulfils its environmental treaty obligations.

Thus, the current federal environmental regulation of Australian forestry operations is manifestly inadequate. It appears a case of 'systemic capture'. Law reform is therefore recommended to overhaul the current regime of RFA exceptionalism, in order to promote a level playing field and fulfilment of Australia's environmental treaty obligations purportedly implemented by the EPBC Act.

Acknowledgments

This thesis would not have been completed without the invaluable support of my supervisors, colleagues, family and friends who have assisted along the way, and to whom I owe a great debt of gratitude. In particular, I acknowledge a few of many who have helped

First and foremost, I gratefully acknowledge and sincerely thank my supervisors, Rick Snell and Michael Stokes, for their guidance, patience, persistence and so many insightful comments on my many drafts, way above and beyond any call of duty. I also thank Marcus Haward and Lorne Kriwoken, research supervisors, and for their forbearance as colleagues in a CSIRO Wealth from Oceans Cluster grant which overlapped the timeframe of this thesis. Thank you also Peter Wilde, Geoff Baxter and Richard Baxter for proof-reading my chapters so ably and carefully.

Thanks to academic and professional staff of both the Faculty of Law and Tasmanian School of Business and Economics for all their assistance, collegiality and support. Thanks to colleagues in the former School of Accounting and Corporate Governance who shouldered my teaching load at critical stages. Thanks to Law staff, both on and off the badminton court.

Thanks to Deb Bowring in the Law Library for EndNote expertise during its various versions and my replacement computer. Thanks to Elise Clark and Robyn Lewis for their dedicated work helping me format no end of tedious references.

Last, but by no means least, special thanks to Eloise. And all my family for their love and support in so many ways during the journey of this PhD and in life generally.

This thesis is dedicated to the late Susan Hrasky, Head of the School of Accounting and Corporate Governance. Thank you, Sue, for all your dedication, friendship, support and wise counsel.

Acronyms and Abbreviations

CAR	comprehensive, adequate and representative
CBD	*Convention on Biological Diversity*
CFMEU	Construction, Forestry, Mining and Energy Union
COAG	Council of Australian Governments
CRA	comprehensive regional assessment
Cth	Commonwealth [of Australia], designating a federal/national statute
DAFF	Department of Agriculture, Fisheries and Forestry (now named Department of Agriculture), a Cth agency
EIA	environmental impact assessment
ENGO	environmental non-government organisation
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999* (Cth)
ESD	ecologically sustainable development
ESFM	ecologically sustainable forest management (
exm	RFA exceptionalism
FPST	Forest Practices System of Tasmania
FT	Forestry Tasmania
GBE	Government Business Enterprise
Gunns	Gunns Limited
HCVF	high conservation value forests

H1	Hypothesis 1
H2	Hypothesis 2
HEC	Hydro Electric Commission (renamed Hydro Electric Corporation)
IGAE	Intergovernmental Agreement on the Environment 1992
MEA	multilateral environmental agreement
MNES	matter(s) of national environmental significance
NAFI	National Association of Forest Industries (later renamed Australian Forest Products Association)
NES	national environmental significance
NFPS	National Forest Policy Statement 1992
NSW	New South Wales
PM	Prime Minister
PMA Act	*Pulp Mill Assessment Act 2007* (Tas)
RFA	regional forest agreement
RFA Act	*Regional Forest Agreements Act 2002* (Cth)
RMPST	Resource Management and Planning System of Tasmania
RPDC	Resource Planning and Development Commission (now TPC)
RQ	Research Question
SEQ	South East Queensland
SEQFA	South East Queensland Forest Agreement
SOFR	*Australia's State of the Forests Report 2008*

Tas	Tasmania (designating a Tasmanian statute)
TPC	Tasmanian Planning Commission
TRFA	Tasmanian Regional Forest Agreement 1997
TWS	The Wilderness Society
TWWHA	Tasmanian Wilderness World Heritage Area
UNCED	United Nations Conference on Environment and Development 1992
VCLT	*Vienna Convention on the Law of Treaties*
WA	Western Australia
WHC	*World Heritage Convention*
WHPC Act	*World Heritage Properties Conservation Act 1983* (Cth)

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Chapter 1 Introduction

> 'The real voyage of discovery lies not in seeking new landscapes but in having new eyes.'
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> Translated from the French novelist Marcel Proust (1923),
> 'La Prisonnière' in *À la Recherche du Temps Perdu*
> [*In Search of Lost Time*].[3]

The focus of this thesis is the federal legal landscape governing Australian forestry, in particular its exclusion from Australia's national environmental statute. Federal and State Governments' justification for this exclusion is tested, as is its compliance with the nation's environmental treaty obligations. The regulatory regime is found wanting in both respects. Hence, the thesis argues for 'new eyes' (through application of the national environmental statute) to scrutinise forestry's environmental impacts where they significantly impact treaty responsibilities. This would improve both the regulatory regime's environmental credibility and Australia's compliance with its international environmental commitments.

The thesis addresses a research gap (1.4.1 below) by examining the under-researched (1.4 below) interface of the two applicable Australian federal statutes, the:

- *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act), Australia's omnibus environmental statute; and
- *Regional Forest Agreements Act 2002* (Cth) (RFA Act), the dominant national statute relating to forestry.

[3] Marcel Proust, 'La Prisonnière [The Captive]' in Andreas Major, Terence Kilmartin and D J Enright (eds), *À la Recherche du Temps Perdu [In Search of Lost Time]* (Modern Library, 1998) vol 5, 1.

Both Acts grant an 'RFA forestry operation' unique, sectoral-wide exclusion from the EPBC Act, through provisions (set out in the thesis' Appendix) which will collectively be termed 'RFA exceptionalism'. RFA forestry operations undertaken in accordance with an RFA are expressly excluded from, inter alia, the EPBC Act's environmental protection and environmental impact assessment (EIA) requirements.[4]

The objects and schemes of the EPBC Act and RFA Act are explained in Chapters 2 and 3 respectively, the latter including comparative analysis of them. The EPBC Act, inter alia, relies on the federal Parliament's external affairs power[5] to implement in Australian law key international environmental treaties These treaties are reflected in the Act's 'matters of national significance' (MNES), most based on treaty obligations. Physical actions likely to significantly impact key components of MNES require a form of EIA and federal approval. The approval decision must, inter alia, be consistent with relevant treaty obligations.

Federal regulation of forestry's environmental impacts currently occurs through the filter (or lens) of regional forest agreements (RFAs) to which the RFA Act gives statutory backing. RFAs are inter-governmental agreements between the Commonwealth and the relevant State, made over each RFA region – except SE Queensland (1.4.6.1). They are generally of 20-year duration which, with their statutory entrenchment under the RFA Act (explained in Chapter 3) enhances resource security for industry, but presents challenges for adaptive environmental management. With many RFAs approaching expiry of their first 20-year term (eg the Tasmanian RFA due to expire in 2017) the federal Liberal Party made a 2013 election commitment to a second round of 20-year extensions to RFAs.

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[4] *Regional Forest Agreements Act 2002* (Cth) s 6(4); *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38.
[5] *Australian Constitution* s 51(xxix).

So, in addition to its significance summarised in the next section, this thesis is highly topical in respect of, eg:

- the forthcoming prospect of 20-year RFA expiries and renewals;
- potential EPBC Act delegations to State governments (noted below); and
- its case studies, particularly as to:
    - Chapters 5's case study including World Heritage forest extensions in June 2013 (and the Liberal Party then seeking their excision); and
    - Chapter 7's case study of EIA for the Tamar Valley pulp mill proposed by Gunns Limited (in liq), the statutory Pulp Mill Permit now for sale by Gunns' receiver, KordaMentha.

1.1 Objective and Significance

This thesis' examines Australia's federal legislative regime regulating environmental impacts of forestry operations, by specific reference to those carried out in Tasmania. Its primary purpose in so doing is to evaluate whether the regime is sufficient to discharge Australia's relevant obligations under multilateral environmental agreements (MEAs) from which forestry operations might derogate.

The EPBC Act, amongst other functions, is the statute through which Australia now implements in domestic law the major MEAs imposing relevant treaty obligations. Indeed, the Act's environmental protection measures are focused on MNES, most the subject of international treaty obligations. For example, the Act governs Australia's Word Heritage properties and nationally listed threatened species. Significant

impacts on these matters by non-forestry industries require approval by Australia's Environment Minister, which must not be granted inconsistently with international obligations or associated domestic management measures the Act specifies.[6]

However, forestry operations in RFA regions are largely exempt from the EPBC Act's environmental protection requirements,[7] as Chapter 3 explains. This regime of 'RFA exceptionalism' is justified by Australia's state and federal governments and national forest industry association on the basis that regional forest agreements (RFAs) provide 'an equivalent level of protection to that provided by the EPBC Act.'[8] Therefore, they argue, it is appropriate that 'forestry operations undertaken in RFA regions do not require approval under the [EPBC] Act.'[9] The thesis critically examines that rationale for the legal regime of RFA exceptionalism and demonstrates that RFAs do not provide environmental protection equivalent to the EPBC Act.

In so doing, the thesis asks a related question: does Australian law require from forestry operations sufficient safeguards to meet the nation's relevant environmental treaty commitments? As Chapter 2 explains, it is a fundamental norm of international treaty law, codified in the *Vienna Convention on the Law of Treaties*, that every treaty is binding upon its parties 'and must be performed by them in good faith.'[10] The Australian Government's Department of Agriculture, Fisheries and Forestry (DAFF) acknowledged that 'The Commonwealth has obligations under international conventions …' which involve it 'in making decisions about forest management':

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[6] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 137-140.
[7] *Regional Forest Agreements Act 2002* (Cth) s 6(4); *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 38-42, s 75(2B).
[8] Montreal Process Implementation Group for Australia, 'Australia's State of the Forests Report 2008' (Bureau of Rural Sciences, 2008) <http://adl.brs.gov.au/forestsaustralia/publications/sofr2008.html>, 186, discussed below at 1.5.1 and in Chapter 3.
[9] Ibid.
[10] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26.

> The National Forest Policy Statement and the Intergovernmental Agreement on the Environment identify circumstances that may involve the Commonwealth in making decisions about forest management. *The Commonwealth has obligations under international conventions and in relation to export or foreign investment approvals* and ....[11]

While the Commonwealth's export approval powers *were* an important instrument for its environmental regulation of forestry, they have now been abandoned by the EPBC Act[12] and RFA Act,[13] as Chapter 3 explains. Nevertheless, the Commonwealth *purports* to fulfil through the EPBC Act its responsibilities as agreed by all of Australia's federal and State governments in the NFPS and the IGAE: namely, 'safeguarding … national environmental matters', including 'ensuring that international obligations relating to the environment are met by Australia.'[14]

Australia implements its environmental obligations under key MEAs through the EPBC Act. Yet RFA exceptionalism and extraordinary governmental measures taken to fortify the regime against legal challenge, or environmental assessment under the EPBC Act, (detailed in Chapters 6 and 7) have jeopardised Australia meeting certain relevant international obligations. Avoiding inconsistency with these obligations is a mandatory requirement of EPBC Act approvals,[15] which could be judicially reviewed for failure on that ground. But no such requirement is specified in the RFA Act, or in the RFAs themselves. The consequent gap in Australian forestry law places at risk:

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[11] Department of Agriculture, *The RFA Process* Australian Government <http://www.daff.gov.au/rfa/about/process/introduction> (emphasis added).
[12] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 524.
[13] *Regional Forest Agreements Act 2002* (Cth) ss 6(1), (2).
[14] Commonwealth of Australia, *Intergovernmental Agreement on the Environment*, 1 May 1992 (a copy of which is set out in the *National Environment Protection Council Act 1994* (Cth) Schedule), cl 2.2.1(i).
[15] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 137-140: see Chapter 2.

- threatened forest-dependent species and their habitat (see Chapter 6); and
- forests of outstanding universal value yet to be World Heritage listed (such forests were logged for decades in Tasmania until added to the Tasmanian Wilderness World Heritage Area (TWWHA) in June 2013: see Chapter 5).

For example, logging endangered species' habitat breaches the *Apia Convention*[16] and *Convention on Biological Diversity* (CBD),[17] as Chapter 6 explains. Hence, these MEAs mandate off-reserve species conservation measures (1.2.4). Yet Chapter 6 demonstrates how a 2007 Tasmanian Regional Forest Agreement (TRFA) variation ensured such management prescriptions are unenforceable.

The thesis' findings of inadequacies in Australian law (current as at 1 July 2013), are important in themselves, but more so given implications for Australia's international environmental obligations. The thesis argues that Australian law's deference to the RFA regime critically undermines the nation's discharge of key MEA obligations. This is all the more significant given the fundamental international law duty of each nation State to perform its treaty obligations in good faith,[18] summarised below.

1.2 Brief Summary of the Legal Regime

The regulatory regime examined in Chapters 2-4 is succinctly summarised in this extract from *Australia's State of the Forests Report 2008* ('SOFR'):

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[16] *Convention on Conservation of Nature in the South Pacific*, opened for signature 12 June 1976, [1990] ATS 41 (entered into force 26 June 1990).
[17] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).
[18] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26. See 1.2.1 and Chapter 2.

> The management of land and natural resources, including forests, is largely the domain of the state and territory governments. However, *the Australian Government is responsible for meeting the country's international obligations* through the conventions and treaties to which it is party *and has the constitutional power* to make decisions on land management in fulfilment of those obligations. It rarely exercises this power, although it reserves the right to do so on matters of national importance.[19]

The SOFR was prepared on behalf of Australia's national, state and territory governments, so carries their joint authority. But its above quote belies the years of legal and political struggle to reach such a consensus. It summarises a position reached in Australia after considerable disputation. Chapter 2 charts the path through the oft-contested terrain traversed to reach this legal landscape, as follows.

1.2.1 International Duty to Perform Treaty Obligations

The thesis depends on the duty of nation States to uphold their treaty commitments. This is reflected in the fundamental rule '*pacta sunt servanda*' (ie treaties are made to be kept),[20] or 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'[21] Australia claims to comply with its international obligations being a 'good global citizen'.[22] Accordingly, this thesis is less concerned with the implications of non-compliance with the various conventions considered

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[19] *Montreal Process Implementation Group for Australia, 'Australia's State of the Forests Report 2008'* (Bureau of Rural Sciences, 2008) <http://adl.brs.gov.au/forestsaustralia/publications/sofr2008.html>, xvi (emphasis added).
[20] Ibid.
[21] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26.
[22] An attribute, eg, Australia's then Foreign Minister credited as instrumental to its election to the UN Security Council, 'It's an endorsement of Australia's good global citizenship …': Greg Truman, 'UN Council Seat Win 'a lovely moment': Carr', *The Sydney Morning Herald* (Sydney), 19 October 2012 <http://news.smh.com.au/breaking-news-world/un-council-seat-win-a-lovely-momentcarr-20121019-27umm.html>; Bob Carr, *Our Rightful Place at the Table of World Powers* (25 October) Thoughtlines with Bob Carr <http://bobcarrblog.wordpress.com/>.

herein (eg the listing of World Heritage properties on the In Danger list), since penalties ought not be necessary to motivate Australia to rectify its treaty breaches. Chapters 5-7 examine key obligations under MEAs relevant to forestry.

1.2.2 Domestic Responsibility to Implement Treaties

Chapter 2 argues that within the Australian federation, treaty implementation is primarily the duty of the Commonwealth, which signs Australia up to international agreements and has the constitutional power to enforce them domestically.[23] This Commonwealth responsibility is acknowledged in intergovernmental agreements,[24] by Australia's Government[25] and today, by even the states and territories.[26] One EPBC Act object, in s 3(1)(e), is 'to assist in the co-operative implementation of Australia's international obligations'.[27] It is to be hoped that States would at all times co-operate in such endeavours, however, history demonstrates that this does not always occur. Since, 'The best indicator of future behaviour is past behaviour',[28] ensuring Australia's compliance with its international obligations requires the Commonwealth to retain its capacity to take such measures as may be required from time to time to rein in recalcitrant States. The Commonwealth cannot divest itself of this duty (akin to a 'non-delegable' duty in tort law) for Australia's international obligations simply by EPBC Act object s 3(1)(e) seeking their 'co-operative

[23] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Richardson v Forestry Commission* (1988) 164 CLR 261 ('*Tasmanian Forests Case*'); *Queensland v Commonwealth* (1989) 167 CLR 232 ('*Wet Tropics Case*').
[24] See eg the Commonwealth of Australia, *Intergovernmental Agreement on the Environment*, 1 May 1992 (a copy of which is set out in the *National Environment Protection Council Act 1994* (Cth) Schedule); Commonwealth of Australia, *National Forest Policy Statement*, 1992.
[25] Department of Agriculture, above n 11.
[26] Montreal Process Implementation Group for Australia, above n 8, xvi.
[27] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(e).
[28] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34 [271].

implementation'.[29] The Commonwealth speaks softly in environmental regulation but must 'carry a big stick'[30] – and be prepared to use it when necessary.

1.2.3 Domestic Law

Major MEAs relevant to Australian forestry operations, and hence to this thesis, are implemented in Australian law by its omnibus environmental statute the EPBC Act. The Act exemplifies the Commonwealth's reticence to exercise its hard-won constitutional power, preferring instead a framework model of co-operative environmental federalism. Forestry, however, is exempt from the EPBC Act, regulated instead under the RFA Act. It takes co-operative environmental federalism too far, at the expense of Commonwealth mechanisms to enforce treaty compliance.

1.2.3.1 EPBC Act

The EPBC Act's 'environmental protection' purpose is summarised by its primary (or at least, first-listed) object, 'to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance'.[31] Most of these MNES are defined by international agreements, thereby attracting the Australian Parliament's external affairs power.[32] It empowers Commonwealth legislation appropriately adapted to implementing

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[29] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(e).

[30] An aphorism famously used by U.S. President Theodore Roosevelt: <http://en.wikipedia.org/wiki/Speak_softly_and_carry_a_big_stick>. Applied to environmental regulation by Ralf Buckley, 'Speak Softly and Carry a Big Stick' (2000) 17(4) *Environmental Planning and Law Journal* 361 reviewing Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998). See also Rob White and Diane Heckenberg, 'Environmental Harm is a Crime', July 2012, Briefing Paper No. 6, School of Sociology and Social Work, University of Tasmania, 19 quoting B Robinson, (2003) *Review of the Enforcement and Prosecution Guidelines of the Department of Environmental Protection of Western Australia*. (Perth: Communication Edge), 11.

[31] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(a).

[32] *Australian Constitution* s 51(xxix).

Australia's obligations under international law. The MNES (and hence, the MEAs which produced them) largely define the scope of the EPBC Act, which relies heavily on the external affairs power. This is more for reasons of Australian constitutional history than lack of alternative Commonwealth heads of power (eg the corporations power)[33] available under contemporary constitutional law.

While the EPBC Act's primary object above refers to protection 'especially' of MNES, the Act's EIA provisions (as distinct from its biodiversity conservation machinery) protect *only* MNES. ie EPBC Act EIA includes the MNES subset of environmental values but excludes non-MNES environmental values (see Chapter 7). The EPBC Act replaced various separate federal Acts governing specific issues eg: World Heritage,[34] endangered species[35] or EIA.[36] Each issue has a thesis chapter devoted to it, including a Tasmanian case study: Chapters 5, 6 and 7 respectively.

Chapters 2 explains the EPBC Act's narrowing of federal EIA (to MNES), compared to legislation which the EPBC Act replaced. Chapter 7 exemplifies how this undermined holistic, integrated EIA of projects, even before forestry's exemptions.

1.2.3.2 RFA Act

The RFA Act is Australia's principal national forestry statute defining (so as to limit) the Commonwealth's role in governance of the industry. It gives statutory force to RFAs, bilateral agreements between a State and the national government regarding forestry operations undertaken in RFA regions (such as Tasmania).

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[33] Ibid s 51(xx).
[34] *World Heritage Properties Conservation Act 1983* (Cth).
[35] *Endangered Species Protection Act 1992* (Cth).
[36] *Environmental Protection (Impact of Proposals) Act 1974* (Cth).

EPBC Act ss 38-40 and the RFA Act s 6(4) exclude forestry operations in RFA regions from the EPBC Act's environmental protections: a policy approach which this thesis terms RFA exceptionalism. Forestry is the only industry to enjoy such blanket, industry-wide, legislative exemptions from the EPBC Act. Subsection 75(2B) of the EPBC Act extends the ss 38-40 exemption from forestry operations to prohibit consideration of their impacts in EPBC Act EIA and approvals (eg actions which will utilise RFA wood, as in Gunns Limited's pulp mill proposal examined in Chapter 7). By contrast, the EPBC Act's definition of 'impact[37] governs EIA scoping of impacts to be assessed for non-forestry projects. This definition, it will be argued, should also apply to projects for the downstream processing of wood, so as to ensure consistency and a level playing field across industry in project EIA.

Thus, through these provisions (set out in the thesis' Appendix), the EPBC Act is rendered subservient to the subsequently-passed RFA Act. The EPBC Act does not protect MNES from forestry operations undertaken in accordance with an RFA.

1.2.4 Off-Reserve Conservation / Management Prescriptions

A key flaw of the TRFA is inadequate federal capacity to enforce 'off-reserve' conservation measures for forestry operations, beyond the reserve system, in recognition of the fact that some species live outside it, so reserves are not a panacea. Most of the focus during the RFA process, and in the literature critiquing it, focused on its CAR reserves, and alleged inadequacies in their establishment. In Tasmania, large tracts of SW Tasmanian wilderness are protected from forestry: much due to World Heritage listings and some other reserves arising under the TRFA. However, significant areas of high conservation value forests (HCVF) remain unreserved and

[37] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 527E.

currently available for forestry. Furthermore, some World Heritage 'extension' forests were logged for many years prior to their listing in June 2013, as Chapter 5 documents. The TRFA's exclusion from reserves of areas which are now listed World Heritage, calls into question whether TRFA reserves were, in fact, CAR.

The Tasmanian Forests Agreement (TFA) sought to reserve more areas. However, it was short-lived, and reserves may intensify forestry operations in other areas, threatening their values. This is where 'off-reserve' management prescriptions to mitigate the impacts of activities such as forestry are recognised by scientists as vital.[38] Governments claim that the RFA regime provides protection. However, the legal mechanisms necessary to ensure that such prescriptions are mandated are sadly lacking. Indeed, as will be seen in Chapter 6, a Federal Court appeal judgment in *Forestry Tasmania v Brown* [39], combined with redrafting of key TRFA provisions, waters down environmental safeguards to such an extent that the TRFA no longer appears to mandate even management prescriptions which industry has to date recognised as essential. This has potentially disastrous environmental consequences.

1.2.5 Regulatory Capture

Regulatory capture 'describes the process by which government agencies responsible for corporate regulation shift from enforcing public interest law to serving the interests of the corporate identities being 'regulated'.'[40] Its extreme forms include 'systemic capture' which 'refers to the procuration of an entire regulatory system by

[38] See eg David Lindenmayer, 'The Conservation and Management of Ecological Communities' in John Mulvaney and Hugh Tyndale-Biscoe (eds), *Rediscovering Recherche Bay* (Academy of the Social Sciences in Australia 2007) 145, 149-151.
[39] (2007) 167 FCR 34.
[40] Michael Briody and Tim Prenzler, 'The Enforcement of Environmental Protection Laws in Queensland: A Case of Regulatory Capture?' (1998) 15(1) *Environmental and Planning Law Journal* 54, 55.

the regulated industry'.[41] The phenomena are further explained in Chapter 4, in the applied context of analysing of the Forest Practices System of Tasmania (FPST).

In their analysis of regulatory capture, Briody and Prenzler state that, 'Legislation may be partly symbolic, designed to satisfy international obligations, or to quiet public interest groups, with a tacit understanding between government and regulators of under-enforcement.'[42] Doctrinal analysis of legislation (and case studies applying it – both judicial and in the World Heritage context) is a core approach of this thesis (see the thesis Method, explained at 1.6 below). Hence, these three elements of captured legislation deserve brief consideration at this point.

This thesis argues that meeting international obligations should go beyond mere symbolism. As Chapter 2 explains, it is a fundamental duty of all State parties 'to perform their treaty obligations in good faith'[43] The *Vienna Convention on the Law of Treaties* clearly codifies this duty.[44] While the EPBC Act's objects include 'implementation of Australia's international environmental responsibilities' (albeit in a 'co-operative' manner),[45] the RFA Act makes no such claim.

As for quieting public interest groups, governments promoted the RFA regime as drawing a line under forestry disputes, but unsuccessfully. Conflict continued in RFA regions (though least in SE Queensland, resolution achieved without an RFA).[46] RFA exceptionalism can, however, stymie attempts by public interest litigants to

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[41] Ibid 55.
[42] Ibid 55.
[43] Donald R Rothwell et al, *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press, 2011), 133 explaining the rule of *pacta sunt servanda*: see Chapter 2.
[44] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26.
[45] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(e): it and co-operative environmental federalism are analysed in Chapter 2.
[46] See this chapter's literature review regarding SE Queensland.

apply the EPBC Act to forestry (Chapter 6 and 7 case studies examine such litigation).

In terms of under-enforcement, Chapter 4 includes analysis of the FPST and sworn evidence by one of its former auditors of systemic under-enforcement. Bill Manning's evidence to a Senate Committee included the treatment he received when trying to prosecute breaches, which he alleged was part of an entrenched culture of 'cronyism, intimidation and deception'.[47] Hence, the three attributes of captured legislation can each be applied in the context of RFA exceptionalism. Accordingly, once the legislative regime and its practical application are explored and assessed against the thesis' RQs using doctrinal analysis, the explanatory value of regulatory or systemic capture are considered in Chapters 4 and 8.

1.3 Rationale

The primary raison d'être for the thesis is to critically assess Australia's federal regulatory framework for forestry, particularly its use of RFA exceptionalism, in terms of its 'procedural effectiveness' for achieving environmental protection sufficient (see below) to meet Australia's relevant environmental treaty obligations. Procedural effectiveness, in this context, considers whether the legal framework for forestry established by the RFA Act, in conjunction with the EPBC Act, is a sufficiently environmentally protective regulatory regime. This focus on procedural effectiveness is appropriate for a legal PhD examining a system of regulation. It can be contrasted with substantive effectiveness[48] which might seek to quantify environmental outcomes 'on the ground' relating to the administration of RFAs.

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[47] Andrew Darby, 'It's a Free-For-All For Logger', *The Age* (online), 18 October 2003 <http://www.theage.com.au/articles/2003/10/17/1066364486654.html>.

[48] Simon Marsden, *Legislative Environmental Assessment: An Evaluation of Procedure and Context with reference to Canada and the Netherlands* (PhD Thesis, University of Tasmania, 1999), 5.

While procedural effectiveness suffices as the thesis' primary analytical lens to test whether domestic law adequately implements international obligations, Chapters 5, 6 and 7, extend (or 'ground-truth') the thesis' arguments through their case studies to also include, arguably, some elements of substantive effectiveness. Analysis reveals both potential risks of treaty breaches (procedural ineffectiveness) and, through the case studies, some substantive examples that occurred in Tasmania.

The question of what is *sufficient* environmental protection is inherently somewhat subjective, inevitably involving value judgements. For example, environmental protection of forests and their ecosystem services (eg regulating water quality and quantity, carbon sequestration, conservation of flora and fauna, scientific research and education) may involve trade-offs with timber production.[49] Even within 'multiple use' forests, economic activities compete with each other (eg, log trucks are essential for forestry, but hazardous to tourists). The relative value an individual ascribes to each ecosystem service or economic use affects one's preferences.

Accordingly, to reduce this problem (though it may not be possible to eliminate), this thesis sets some minimum legal benchmarks, or sufficiency tests, against which the regulatory system can be assessed with some degree of objectivity. The main test of sufficiency used is whether the domestic regulatory regime for forestry adequately implements Australia's relevant international environmental obligations in MEAs implemented by the EPBC Act. A second sufficiency test used is whether the RFA regime meets the claim made of it by Australia's national and State governments to

[49] Juliet Forsyth, 'Anarchy in the Forests: a Plethora of Rules, an Absence of Enforceability' (1998) 15 *Environmental Planning and Law Journal* 338, 338.

justify RFA exceptionalism, ie 'that RFAs are regarded as providing an equivalent level of protection to that provided by the EPBC Act.'[50]

An alternative way to pose these questions could be in reverse, ie: does a lack of RFA equivalency with the EPBC Act's protective provisions mean that Australia is potentially, or actually, at risk of breaching its relevant international obligations? The thesis' short answer to this question is in the affirmative, on grounds summarised as follows. Chapter 2 explains, inter alia, how the EPBC Act provides for protection of MNES (most defined by reference to treaty obligations). The Act subjects an action likely to significantly impact a MNES to EIA and Ministerial approval processes. It prohibits approvals inconsistent with Australia's relevant international obligations. Breach of this prohibition could attract judicial review or civil enforcement brought by third parties using the Act's wide standing tests.[51]

By contrast, RFAs added forest reserves to Australia's protected area system, but do not directly regulate forestry operations outside them, relying on State laws for that. To this extent, RFAs largely leave forestry regulation with its traditional custodians, the States.[52] Indeed, Chapter 3 explains how the RFA Act aims to entrench RFAs and 'resource security',[53] requiring compensation payments if a future Australian government unilaterally expands forest reserves. The RFA Act does not provide the EPBC Act's 'top-up' off-reserve protections for MNES, nor does it prohibit treaty

[50] Montreal Process Implementation Group for Australia, above n 8, 186.
[51] EPBC Act ss 136-140A. See further Chapter 2 at 2.5.7.6 Approvals Must Not Breach Convention Obligations.
[52] See Chapter 3, at 3.1.3 EPBC Act – RFA Act Comparison, and Chapter 4.
[53] See thesis section 3.7 Objects of the RFA Act. As to resource security, see eg National Association of Forest Industries (NAFI), 'Building a Competitive Forest and Forest Products Industry: a policy statement' in Alexander Gardner (ed), *The Challenge of Resource Security: Law and Policy* (Federation Press, 1993), and other chapters therein.

breaches. Furthermore, Chapter 3's comparison of the EPBC Act and RFA Act finds the latter lacks provision for third party enforcement.[54]

Chapters 5-7 demonstrate the effects of RFA exceptionalism on specific MNES, including, through their case studies, in practice. For example, Chapter 6's case study litigation[55] shows how readily the TRFA was varied by two governments to deem threatened species to be protected (in order to defeat third party enforcement efforts). This emasculated not only protection for the species in that case, but also Commonwealth capacity to enforce off-reserve forestry 'management prescriptions', even where needed to prevent a species being driven to extinction. This reduced the TRFA's legally enforceable protection to its reserves, despite *Apia Convention*[56] obligations to protect threatened species outside protected areas. This domestic contradiction of treaty obligations exemplifies how RFA exceptionalism permits forestry in breach of the *Apia Convention*.

A secondary rationale for the thesis is that if it identifies any major systemic deficiencies in the regulatory regime for forestry that prevent it meeting the above tests, then recommendations to overcome them (eg law reform) can be developed, potentially contributing to law reform in an important field.

Tertiary reasons for, or spin-off benefit from, the research comes in other lessons to be drawn from comparative analysis of the EPBC Act and RFA regimes. For example, the former adopts a predominantly regulatory approach, containing offences and enforcement mechanisms for both government and third parties.

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[54] Ibid.
[55] *Forestry Tasmania v Brown* (2007) 167 FCR 34.
[56] *Convention on Conservation of Nature in the South Pacific,* opened for signature 12 June 1976, [1990] ATS 41 (entered into force 26 June 1990).

Whereas the RFAs and their Act, excluding penalties and third party enforcement, can be characterised as largely consensual, at least as between:

- their parties – the federal and relevant State government; and
- to a lesser extent, these governments and the forestry industry.

Chapter 4 demonstrates this, drawing parallels between RFA exceptionalism and Tasmanian forestry laws, placing the latter's emphasis on self-regulation within wider regulatory theory. The thesis argues that it and RFA exceptionalism over-emphasise consensual self-regulation to an extent risking regulatory, or even systemic, capture. Repealing exceptionalism to apply to forestry significantly impacting MNES the more prescriptive EPBC Act (with its backstop of third party enforcement capacity) could help address capture risks.

1.4 Australian RFA Law Literature

Further reasons for studying the EPBC-RFA Act nexus include its legal and environmental importance, plus a gap in the academic literature (temporally and analytically) relative to the topic's significance.

Key findings of academic literature relevant to this thesis' research questions are summarised below. Literature more applicable to the EPBC Act (Chapter 2) and the various MNES to which the thesis relates is referenced in relevant chapters. This section surveys academic legal literature focused on RFAs, and in particular, RFA exceptionalism. It reveals a substantial research gap, both:

- temporal (few RFA-focused studies since the RFA Act commenced); and
- in terms of analytical framework – implications of RFA exceptionalism for Australia's international obligations have not been extensively tested.

Australian forestry law academic literature can be divided into two categories:

- studies of the federal RFA regime (rare since the RFA Act commenced); and
- critiques of a specific RFA State's forestry regulation.

Both categories are summarised below. Then emergent themes across the literature are collated. Not covered here (but referenced to the extent relevant in Chapter 2), is a rich vein of literature focused on the EPBC Act, as distinct from forestry, mostly in the *Environmental and Planning Law Journal* (EPLJ). Those referring to RFA exceptionalism mainly do so incidentally, criticising RFA forestry's exclusion from the Act, but given that exclusion, forestry is not their focus. For example, most prominent and persuasive in this regard is ANU EPBC Act expert Andrew Macintosh:

> It is widely recognised that the greatest threats to Australia's biodiversity are caused by:
>
> (a) broad-scale land clearing (excluding clearing for forestry);
>
> (b) forestry operations (including land-clearing, establishment of plantations, fire management practices and harvesting forest products);
>
> (c) ….[57]

He noted that the breadth of the exemptions in the EPBC Act

> … significantly reduce the scope of the [Act's] referral, assessment and approval process and its ability to provide effective protection

[57] Andrew Macintosh, 'Why the Environment Protection and Biodiversity Conservation Act's Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives' (2004) 21 *Environmental and Planning Law Journal* 288, 296 (citations omitted).

> for Australia's biodiversity and other matters of national environmental significance. The most significant of these exemptions include:
>
> - the exemption provided for RFA forestry operations undertaken in accordance with a regional forestry [sic] agreement;
> - … [58]

Exemptions 'reduce the reach of the referral, assessment and approval process, and ensure the Government has the necessary tools to extract controversial projects from the operation of the process'.[59] So Macintosh found 'to provide effective protection for the environment (particularly the matters of national environmental significance), the breadth of the available exemptions must be narrowed considerably.'[60]

This thesis tests, provides evidence and ultimately confirms that view in respect of the RFA exemption(s). Specifically, further to Macintosh's argument, Chapters 2-3 explain RFA exceptionalism legally and also in terms of federal Government motivation to extract itself from forestry controversy. As to 'controversial projects' in the RFA context, see Chapter 7's case study of Gunns Limited's proposed Tamar Valley pulp mill. That chapter explains the application of EPBC Act s 75(2B), an RFA exemption from project EIA inserted in December 2006 (after Macintosh's article), then used to limit EIA of Gunns' pulp mill and litigated in 2007. Chapter 8 recommends specific law reform to address the breadth of RFA exemptions.

[58] Ibid 310 (citations omitted).
[59] Ibid 311.
[60] Ibid 311.

Overall, for such a significant area,[61] the nexus between the EPBC Act and RFA Act has been chronically under-researched in the academic literature. There is a particular absence of contemporary research examining implications of RFA exceptionalism for Australia's treaty obligations. Most authors who consider forestry's regulatory exemptions from federal (or State) laws criticise them, generally for their inadequate enforceable environmental control and/or environmental impact. This thesis takes that further to consider the consequences under international law.

1.4.1 Research Gaps and the Challenges to Fill Them

The academic RFA law literature leaves temporal and analytical research gaps which this PhD contributes to filling. These gaps are stated by the conclusions of the two key legal academics to focus on Australian forestry as RFAs were being executed.

First was the only comprehensive legal academic analysis of Australia-wide RFA policy and process, by Prof Jan McDonald pursuant to her PhD and associated research. This was summarised[62] in her seminal 1999 article.[63]. In brief, McDonald inter alia, assessed the RFA process against ESD principles, identified a number of scientific shortcomings and other deficiencies, and concluded:

> It is too early to assess fully whether the RFA process is moving the Australian forestry industry towards more sustainable practices... Yet, in order for *Australia to fulfil its international conservation obligations* as well as to maximise the full range of economic benefits to be gained from forest resources, *further rapid progress is required*.[64]

[61] Ibid 310.
[62] Personal communication between this author and Prof McDonald.
[63] Jan McDonald, 'Regional Forest (Dis)Agreements: The RFA Process and Sustainable Forest Management' (1999) 11(2) *Bond Law Review* 295.
[64] Ibid 340 (emphasis added).

That was before statutory entrenchment of RFA exceptionalism by commencement of the EPBC Act in July 2000 and the RFA Act in 2002. These widened the gaps which this thesis tackles: in RFA research; and between the 1999 position and that needed 'in order for Australia to fulfil its international conservation obligations'.[65]

Another Queenslander, Prof AJ Brown, also considered sustainable development and forestry before the RFA Act. He did so in the context of the South East Queensland Forest Agreement,[66] concluding his article by setting an RFA research challenge:

> the incoherence of the current national policy approach stands as a worthwhile target for researchers and policy analysts motivated to search for the next generation of answers.[67]

This thesis pursues that worthwhile target, searching for an answer to 'the incoherence of the current national policy approach'. The RFA Act entrenched RFAs and RFA exceptionalism, but without remedying the underlying policy incoherence to which Brown referred. Indeed, RFA exceptionalism contributes to incoherence by excluding forestry from Australia's national environmental law applicable to other industries. National policy incoherence is not remedied by the multiplicity of RFAs – most which are, by definition, regionally-based inter-governmental agreements.

This thesis takes up the challenges posed by Profs McDonald and Brown. It assesses interaction of the EPBC and RFA Acts (both commenced after McDonald's article), including their subsequent litigation. The jurisprudence from the two major Federal Court cases testing RFA exceptionalism: the *Wielangta Case* in 2006; and pulp mill

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[65] Ibid.

[66] Australian Rainforest Conservation Society, the Queensland Conservation Council, The Wilderness Society, the Queensland Timber Board and the Queensland Government, *South East Queensland Forest Agreement*, 16 September 1999.

[67] AJ Brown, 'Beyond Public Native Forest Logging: National Forest Policy and Regional Forest Agreements after South East Queensland' (2001) 18 *Environmental and Planning Law Journal* 189, 208. See further below under the heading, 'Queensland'.

assessment case in 2007, are examined in Chapter 6 and 7 case studies respectively. As did Brown, the thesis focuses on a specific RFA region: Tasmania. The TRFA covers the entire State, but the thesis finds little national policy coherence to comfort Brown. It traverses new academic legal ground, applying to the journey 'news eyes',[68] particularly as to the effect of RFA exceptionalism on the quest McDonald identified 'for Australia to fulfil its international conservation obligations'.[69]

The thesis helps fill important temporal and analytical gaps in the academic legal literature and develops law reform recommendations to bridge the chasm between the EPBC and RFA Acts, which inhibits McDonald's aspiration for Australia to satisfy its treaty obligations. The thesis' ultimate law reform recommendation – repeal of RFA exceptionalism – would leverage the EPBC Act to address key challenges posed by McDonald and Brown, in the manner summarised at 1.4.4.

1.4.2 Assessment of RFA Process Against ESD Principles

McDonald's assessment the RFA process against principles of ESD[70] was well worthwhile given that ESD has since become even more axiomatic to environmental law internationally, and specifically in Australia.[71] For example, in his January 2010 foreword to Prof Fisher's *Australian Environmental Law* text, the Hon Justice Brian J Preston SC, Chief Judge of the Land and Environment Court of NSW, wrote:

> Professor Fisher elevates ecologically sustainable development to be what Hans Kelsen referred to as a "grundnorm" … the basic, fundamental postulate which justifies all principles and rules of the

[68] Proust, above n 1.
[69] McDonald, above n 63, 340.
[70] Ibid.
[71] See eg from Douglas E Fisher, 'Sustainability - the Principle, its Implementation and its Enforcement ' (2001) 18 *Environmental and Planning Law Journal* 361 to Douglas E Fisher, *Australian Environmental Law: Norms, Principles and Rules* (Lawbook, 2nd ed, 2010) 72.

> legal system and from which all inferior rules of the system may be deduced.[72]

1.4.3 International Principles of (E)SD Applying to Forestry

McDonald relied largely on the *Rio Declaration*[73] and other relevant instruments from the 1992 United Nations Conference on Environment and Development ('UNCED') to provide the international law context for ESD. The particularisation of principles of sustainable development in the *Rio Declaration* provided a toolkit more more nuanced and useful for specific application than the broad concept of sustainable development popularised by the Brundtland Report.[74] However, as McDonald noted, the *Rio Declaration* 'set out general non-binding principles'.[75]

The general concept and specific principles of sustainable development set out in the *Rio Declaration* now have more force in international law[76] than when McDonald applied them to the RFA process. Nevertheless, the principles remain soft, rather than hard, universally applicable, international law. So this thesis uses instead key treaties which are binding on Australia (and, in the case of the WHC and CBD, have near universal State membership). It also considers the EPBC Act's ESD principles.

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[72] Fisher, *Australian Environmental Law: Norms, Principles and Rules*, above n 71, v.
[73] *Rio Declaration on Environment and Development*, adopted June 14 1992, *Report of the United Nations Conference on Environment and Development* 3, Rio de Janeiro, June 3-14, 1992, UN Doc. A/Conf. 151/51 Rev 1, Vol I, United Nations Publication Sales No.E.93.I.8, New York (1993) reprinted in (1992) 31 I.L.M. 874, at 878, (the *Rio Declaration*): see McDonald, above n 63, 300-1.
[74] Brundtland defined 'sustainable development' as 'development that meets the needs of present generations without compromising the ability of future generations to meet their own needs'World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987), 1, 46.
[75] McDonald, above n 63, 301, n 24.
[76] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & the Environment* (Oxford University Press, 3rd ed, 2009), 114.

ESD principles, McDonald noted, [77] 'were applied specifically to forest management issues in the Non-Binding Statement of Forest Principles (the Forest Principles)'.[78] However, as Birnie, Boyle and Redgwell state:

> Attempts to negotiate at Rio an International Convention on Conservation and Development of forests were blocked … Instead, the curiously entitled 'Non-legally Binding Authoritative Statement of Forest Principles' was adopted which, as Szekely pithily concludes, falls 100 per cent short of providing even the most elementary basis for protection of the world's forests.[79]

McDonald highlighted that:

> Paragraph (d) of the Statement's Preamble provides that the Principles 'reflect a first global consensus on forests…[c]ountries also decide to keep [the principles] under assessment for their adequacy with regard to further international cooperation in forest issues.' The Principles seek to draw connections between the forests issue and the wider issues of environment and development. Forest Principles, Preamble ¶(a) and (c).[80]

McDonald added, 'The *Convention on Biological Diversity* (CBD), the *United Nations Framework Convention on Climate Change* (UNFCCC) and the *Convention on Desertification* all contain obligations that encompass and contemplate forest conservation.'[81] The only one of these implemented by the EPBC Act, the CBD, is considered in Chapter 6. This is a useful source of international obligations, whereas

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[77] McDonald, above n 63 301.
[78] *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Vol I and corrigendum, resolution 1, annex III.13 June 1992, UN Doc A/CONF 152/6/Rev.1, 31 ILM 881 (1992).
[79] Birnie, Boyle and Redgwell, above n 76, 695.
[80] McDonald, above n 63, 302, n 25.
[81] Ibid 301, n 24.

after UNCED's Forest Principles, international forest talks continued but no text '… emerged as any kind of precursor to formal negotiations on a convention.'[82]

1.4.4 EPBC Act's Principles of ESD and an RFA Solution

In Australia, the word 'ecologically' has become a ubiquitous domestic preface to 'sustainable development' (distinguishing ESD from 'sustainable *economic* development').[83] In keeping with its 'grundnorm' status,[84] ESD is now a grand unifying theme or, in Prof Bates' words, 'The Template for Environmental Management'.[85] Hence, promoting ESD through conservation and ecologically sustainable use of natural resources is the EPBC Act's second-listed object.[86] The ESD principles cited by McDonald were subsequently implemented as 'principles of ecologically sustainable development' in EPBC Act s 3A (set out in Chapter 2). They are the first-listed factors the Minister must take into account[87] when weighing, in their final EPBC Act approval decision, the mandatory considerations of:

- economic and social matters; with (or against)
- a tightly specified subset of environmental matters.[88]

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[82] Lorraine Elliott, *The Global Politics of the Environment* (Macmillan Press, 1998), 88.
[83] *Pulp Mills Case (Provisional Measures) (Argentina v Uruguay)* ICJ Reports (2006) para 80 (emphasis added).
[84] Fisher, above n 72 (2010), v.
[85] Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 7th ed, 2010), Chapter 7 'Ecologically Sustainable Development: The Template for Environmental Management'.
[86] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(b). See Chapter 2 as to this object.
[87] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136(2)(a).
[88] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136(1). See Chapter 7 regarding a legally entrenched systemic imbalance in this weighting of matters in the Minister's ultimate project approval decision.

This thesis assesses the RFA regime against different key performance indicators to McDonald - in the form of specific treaty obligations, rather than ESD principles. Enactment of the EPBC Act enables application of both to forestry impacting MNES – if RFA exceptionalism was repealed. But for RFA exceptionalism, forestry operations significantly impacting MNES would trigger the EPBC Act with its requirement to consider, in any approval decision, inter alia, the principles of ESD.

Repealing RFA exceptionalism would, hence, further ESD and McDonald's call for 'Australia to fulfil its international conservation obligations'.[89] It would also:

- heed Brown's call for a more coherent *national* policy approach across disparate RFA regions and RFAs; and
- enhance environmental regulatory coherence (a 'level playing field') across Australian industry sectors, since forestry is the only one now enjoying wholesale exemption from the EPBC Act.

1.4.5 Stating that Statutory Obligations are Met: an RFA Device

Worth flagging now ahead of Chapters 5 and 7 is that McDonald stated:

> The Commonwealth's obligation to identify and protect areas of world heritage or national estate value was largely fulfilled by the application of the JANIS criteria applied for CAR reservation, which was undertaken as part of the comprehensive regional assessments for each region.[90]

She then cited the relevant clauses of all the RFAs which 'stipulate that they represent a fulfilment of the Commonwealth's obligations under' the:

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[89] McDonald, above n 63, 340.
[90] Ibid63, 332.

- *Australian Heritage Commission Act 1975* (Cth);
- *Environment Protection (Impact of Proposals) Act 1974* (Cth); and
- *Endangered Species Protection Act 1994* (Cth).[91]

But McDonald questioned this claim in relation to the AHC Act, s 30 of which provided some protection for places listed on the Register of the National Estate.[92] Each of the above three Acts has since been repealed and replaced by the EPBC Act, which does not protect the national estate, except the very limited subset of it subsequently listed as national heritage under the EPBC Act.

Chapter 5 will argue that, in Tasmania, 'The Commonwealth's obligation to identify and protect areas of world heritage or national estate value' was not fulfilled 'by the application of the JANIS criteria applied for CAR reservation …' sufficiently to meet even Australia's duties under the *World Heritage Convention*, arts 4-5. Forests added to the TWWHA in 2013 lay unprotected, then successive governments refused requests to protect them (while parts were logged), until nomination in 2013.

Beyond the TWWHA, although areas within CAR reserves are currently unavailable to logging, they are not immune from other threats, such as mining.[93]

A more blatant example of RFAs using the device of agreeing a legal fiction is the TRFA variation explained in Chapter 6.

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[91] Ibid 332-3, n 137-140.
[92] Ibid 332-3 (emphasis in original; citation omitted).
[93] Ibid63, citing relevant clauses of all RFAs and noting that 'Some states permit mining in National Parks, in others, mining is prohibited.'

1.4.6 State-Specific Studies of RFA Regions

Ten RFAs are current, applying to RFA regions in four States.[94] The Australian Government's Department of Agriculture, Fisheries and Forestry (DAFF), explains that 'The RFAs cover forested regions where commercial wood production is a major native forest use.'[95] RFA regions are defined and specified in EPBC Act s 41, which is set out in this thesis' Appendix. So is the RFA Act's s 4 meaning of '*RFA forestry operations*', defined be reference to each RFA state.

For each RFA State, a summary follows of the key findings presently relevant from their most prominent academic publications reviewing the outcome of the RFA process (in Queensland's case, a non-RFA agreement) in their respective State.

Two colour maps locating RFA regions are in the Appendix, from DAFF. The key messages from these maps for present purposes are that RFA regions cover:

- The whole of Tasmania, including offshore islands, eg Bruny, Flinders, King.
- Victoria's southern half (containing its commercial forests).
- Southern and North East NSW (not the greater Sydney basin).
- South East Queensland, which remains an RFA region,[96] despite no RFA ever being concluded there (important given that EPBC Act s 40 excludes the EPBC Act there: see thesis 3.3.1, 3.3.2.3 and 3.13.1).

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[94] Department of Agriculture, *[Regional Forest Agreements:] Regions* (15 November 2012) Australian Government <http://www.daff.gov.au/forestry/policies/rfa/regions>.
[95] Ibid.
[96] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 41(1)(h).

1.4.6.1 Queensland

Subsequent to McDonald's article, AJ Brown considered the South East Queensland (SEQ) Forest Agreement, executed on 16 September 1999 by the Queensland Government, the Queensland Timber Board, the Australian Rainforest Conservation Society, the Queensland Conservation Council and The Wilderness Society. It applied to the SEQ RFA region, but was refused federal endorsement – due to it phasing out logging in public native forests by 2024. Key conservation clauses included the parties' agreement that, inter alia:

2.4	There will be immediate addition to the conservation reserve system of an estimated 425,000 ha [as defined in Attachment 1 of original SEQFA] to be completed by 31 December 1999 if possible
2.5	There will be no clearfelling
2.6	There will be no export woodchip industry based on native forests
2.7	There will be no harvesting of non-sawlog material and residues other than for products currently produced
2.8	Logging of native forests on State forests and timber reserves will cease at the end of the year 2024 by the latest

Table 1-1: Key conservation clauses quoted from South East Queensland Forest Agreement[97]

This table shows that the SEQ Forest Agreement embodies a far more environmental outcome than in RFA States such as Tasmania where native forest clearfelling and export woodchipping continue. As McDonald observed, its wide stakeholder support may 'be because the South-East Queensland forests have little remaining old growth and do not support a controversial export woodchipping industry.'[98] Yet:

[97] Clauses extracted from Brown, above n 67, Appendix (setting out the Agreement).
[98] McDonald, above n 63, 26 (citations omitted).

> The Australian Government refused to endorse the SE Queensland Forest Agreement. The Federal Minister for Forestry, Wilson Tuckey, stated that was based upon the Agreement's failure to meet the terms of the 1992 National Forest Policy Statement, which contemplates a continuation of logging in native forests.[99]

Minister Tuckey's above claim is analysed by Brown through a 'logical textual analysis' of the NFPS and other documents governing the SEQ Forest Agreement. Brown rejects Minister Tuckey's claim as spurious, concluding, that Minister Tuckey's refusal to execute the SEQ agreement '…was not because the Commonwealth was precluded from endorsing the SEQ agreement by the National Forest Policy Statement'[100] Brown similarly refutes Minister Tuckey's claim his hands were tied by the *Australian Constitution.*[101] It follows that the Minister had discretion to execute the agreement as an RFA but chose not to do so for political, rather than his claimed legal, reasons (opposing its phasing out of public native forest logging which the Minister wanted to continue). Mr Tuckey's rejection of the SEQ Forest Agreement was a dramatic federal role reversal from the 1980s situation of the Hawke Government intervening in Tasmania and Queensland to restrict logging from damaging forests that are now World Heritage listed. The fact the High Court thrice upheld PM Hawke's protective actions,[102] further supports Brown's argument.

1.4.6.2 NSW

Dr James Prest focussed his doctorate on private forestry in NSW, then published the findings of his PhD[103] in a book chapter.[104] Its sub-title, 'The Regulation of Forestry

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[99] Ibid 26, n 86.
[100] Brown, above n 67, 199 (Prof Brown paraphrasing Minister Tuckey).
[101] Ibid 199-200.
[102] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Richardson v Forestry Commission* (1988) 164 CLR 261 ('*Tasmanian Forests Case*'); *Queensland v Commonwealth* (1989) 167 CLR 232 ('*Wet Tropics Case*').
[103] Personal communication between this author and Dr Prest.

on Private Land in NSW 1997-2002' summarises the scope of his doctoral research in terms of the public/private land ownership divide, geography and time. Compared to Dr Prest, the focus of this thesis:

- is not limited to private land, though the TRFA extends to it (if anything, this thesis focuses on public land, where forestry disputes are most contentious);
- is not on NSW, but rather on federal law under the EPBC Act and RFA Act, as applied in Tasmanian case studies of national / international significance; and
- extends through a later time period, particularly to include the key federal court cases of 2006-2007, examined in Chapters 6 and 7.

1.4.6.3 Victoria

Juliet Forsyth examined Victorian forestry regulation, with focus on the East Gippsland RFA.[105] She argued that:

> The Commonwealth government has used the Regional Forest Agreement process to divest itself of responsibility for forest management. Thus the regulation of logging in Australian forests is done almost exclusively through State legislation and policy.[106]

This thesis demonstrates that passage of the EPBC Act and RFA Act then subsequent case law have confirmed the Commonwealth's vacation of this regulatory field to States. While in these domestic statutes the Commonwealth has indeed divorced itself from hands-on forestry regulation, the thesis argues that it cannot, ultimately,

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[104] James Prest, 'The Forgotten Forests: The Regulation of Forestry on Private Land in NSW 1997-2002' in Daniel Lunney (ed), *Conservation of Australia's Forest Fauna* (Royal Zoological Society of New South Wales, 2nd ed, 2004) 297.
[105] Forsyth, above n 49.
[106] Ibid 338.

'divest itself of responsibility' for meeting its treaty commitments which demand some federal oversight of forest management'. Forsyth's article outlined the framework for regulation of Victoria's public forests and concluded that is structure lacked both accountability and legally enforceable environmental protection measures. Chapter 4 of this thesis examines the FPST, also finding these flaws (eg through multiple legislative exemptions for forestry from State environmental law).

1.4.6.4 Tasmania

Legally, the TRFA is merely an intergovernmental agreement, given greater force by the RFA Act. Politically, however, it is a potent symbol. The TRFA has been effectively critiqued from an environmental management perspective by environmental activist Ula Majewski.[107] She concluded:

> The Tasmanian RFA process was conducted within what was intended to be a systematic, inclusive and integrated planning framework. However, it has been found that the scientific integrity of the process was compromised, largely due to a combination of poor planning and a series of bureaucratically generated amendments to recommendations proposed by expert scientific consultants. Additionally, the key decision making processes embedded within the RFA were, contrary to principles of solid democratic governance, consistently marked by a lack of transparency and accountability. The RFA has been unequivocally successful in alleviating the previously contentious debates between the Commonwealth and Tasmanian State Governments over natural resource management issues. However, it has comprehensively failed to achieve what was initially articulated as one of its raisons d'être, an alleviation of the continuous and divisive community-level conflict over the use of native forests.[108]

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[107] Ula Majewski, *The Regional Forest Agreement and the Use of Publicly Owned Native Forests in Tasmania: an Investigation into Key Decision Making Processes, Policies, Outcomes and Opportunities* (Master of Environmental Management Thesis, University of Tasmania, 2007).
[108] Ibid 64.

Majewski's findings regarding the scientific integrity of the TRFA process are beyond the scope of this thesis, but community conflict over native forests in Tasmania continues to this day. Majewski's findings on both counts echo concerns of Prof Kirkpatrick who concluded a decade earlier of the Australia-wide RFA process:

> … it is a pity that expert advice has been gained and not fully utilised, that conflict will continue, and that some nature conservation values will be severely depleted or lost.[109]

This thesis shares many of these concerns. However, it will take as read the fact that many experts, including some involved in the RFA process such as Kirkpatrick, consider that science was (at least in part) over-ruled by bureaucratic decision-making driven by political, rather than scientific imperatives.

As will be seen in Chapter 6, with the RFAs now given statutory force under the RFA Act, the Federal Court has deferred to Parliament's intent and decreed that the CAR reserve system as established under the RFAs suffices to meet forestry's requirements under Commonwealth law. Case notes regarding *Brown v Forestry Tasmania*[110] and its appeals are considered in Chapter 6.

The pulp mill proposal of Gunns Limited (in liq), which saw the former hardwood woodchipping giant collapse in debt has generated many media column inches. But far less has been written about the litigation regarding the EIA of Gunns' proposal from a forestry focus (the subject of Chapter 7's case study). Michael Stokes has written on the Federal Court appeal against the Minister's EPBC Act assessment decision,[111] and by far the most instructive legal analyses of the Pulp Mill Permit

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[109] Jamie B Kirkpatrick, 'Nature Conservation and the Regional Forest Agreement Process' (1998) 5(March) *Australian Journal of Environmental Management* 31, 36.
[110] (2006) 157 FCR 1, revd (2007) 167 FCR 34.
[111] *The Wilderness Society Inc v Minister for the Environment and Water Resources* (2007) 166 FCR 154. See Andrew Macintosh and Michael Stokes, 'Tasmania and the Gunns Pulp Mill' in Tim

granted under the *Pulp Mill Assessment Act 2007* (Tas).[112] Dr Fred Gale edited the book *Pulp Fiction*[113] which examines the mill from a range of academic disciplines.

During the decade since the RFA Act commenced there has been very little peer-reviewed academic analysis of it, nor, in particular, of the interface between it and the EPBC Act. The author's literature search revealed a few case notes regarding *Brown v Forestry Tasmania*[114] and *Pulp Mill Assessment Case,*[115] considered in Chapters 6 and 7 respectively. Stokes has placed Gunns Limited's pulp mill proposal within its legal context,[116] but it is still under-researched.

Accordingly, the RFA Act's interface with the EPBC Act, while alluded to in case notes regarding the *Wielangta Case* and more substantive pieces by Stokes regarding the pulp mill imbroglio, has not been systemically analysed in academic literature beyond individual (albeit very important) cases. This thesis will undertake such analysis across multiple case studies. Until now, the most detailed analysis of the EPBC Act-RFA interface has occurred through reviews of the EPBC Act (noted in Chapter 8). But these gave scant regard to the *Pulp Mill Assessment Case,*[117] let alone the shortcomings it exposed in EPBC Act EIA.

Bonyhady and Andrew Macintosh (eds), *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (Federation Press, 2010) 16 and Michael Stokes, 'Environmental Assessment in Tasmania: The Resource Management and Planning System' in Fred P Gale (ed), *Pulp Friction in Tasmania* (Pencil Pine Press, 2011) 101.

[112] Michael Stokes, 'Legal Issues Arising from the Pulp Mill Permit issued under the *Pulp Mill Assessment Act 2007* (Tasmania)' (2011) 30(2) *University of Tasmania Law Review* 75;

[113] Fred P Gale (ed), *Pulp Friction in Tasmania* (Pencil Pine Press, 2011).

[114] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34.

[115] *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175 ('*Pulp Mill Assessment Case*').

[116] See Chapter 7.

[117] *The Wilderness Society Inc v Minister for the Environment and Water Resources* (2007) 96 ALD 655; affd (2007) 166 FCR 154

1.4.6.5 Western Australian (WA) RFA

Horwitz and Carver[118] assessed the credibility of the WA CRA against four principles of a 'scientifically credible process' They found it lacking,[119] concluding:

> … the lack of scientific transparency in the Western Australian RFA process makes possible the interpretation that decision-makers may well be using science as a façade in the process.[120]

McDonald records that Horwitz and Carver found, for example, that:

> many studies were omitted from the CRA. Of those 38 reports that were undertaken for the CRA, 26 had the involvement of WA's forestry agency, the Department of Conservation and Land Management.'[121]

Another indication of strengthened concern over the WA RFA process is 'the history of litigation in which environmental groups have sought to question CALM's [WA Department of Conservation and Land Management] forest management practices'[122]

Subsequently to completion of the WA RFA, WA ceased logging its old growth forests, so as to protect its remaining pockets of old growth jarrah and kauri forest. This fact supports Brown's arguments above that the Australian Government's insistence that the SEQForest Agreement must provide for a continued, viable native

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[118] P Horwitz and M Calver, 'Credible Science? Evaluating the Regional Forest Agreement Process in Western Australia' (1998) 5(March) *Australian Journal of Environmental Management* 213.
[119] McDonald, above n 63, 326-7.
[120] Horwitz and Calver, above n 118, 223 quoted by McDonald, above n 63, 328.
[121] McDonald, above n 63, 327.
[122] Ibid 327, n 114 citing, for example, *Bridgetown/Greenbushes Friends of the Forest Inc v Executive Director of Conservation and Land Management* (1998) 18 WAR 102; *Executive Director of Conservation and Land Management and Anor v South-West Forest Defence Foundation Inc and Anor* (1998) 18 WAR 126. The latter ultimately set an important High Court precedent as to costs in applications for special leave: *South-West Forest Defence Foundation (No 2) v Department of Conservation & Land Management (No 2)* (1998) 101 LGERA 114.

timber industry and consequent refusal to endorse that Agreement on that ground (claiming incompatibility with the NFPS), was not justified by the NFPS.

1.4.6.6 Queensland and WA's Solution to Conflict – Plantations?

Queensland and WA results are also endorsed by ANU economist Dr Judith Ajani. Her economic PhD research sought 'to understand how Australia came to plant so many softwoods and developed a new forest policy that explicitly included Australia's plantations.'[123] Her subsequent book, *The Forest Wars,* arose from her need 'to answer the question I originally could not. Given Australia's plantation resources, why does the forest conflict persist?'[124] It is an insightful history and economic analysis of Australian forestry, 'focused on the private industry conflict borne from the plantation arrival.'[125] Ajani summarised her three findings:

> First, Australia's forest conflict persists only because government has not let new, economically superior [plantation] products displace environmentally inferior [native forest] products in the market. Second, this government failure does not mean Australia is doomed to endless conflict over native forests. The evidence comes from Australia's resource-rich states – Queensland and Western Australia. Their premiers personally engaged in forests and drove native forest product substitution and environmental protection with stunning speed and thoroughness. … The last … is that long, entrenched conflict takes on a life of its own. Some people thrive on conflict and actively promote it for their own ends. Rational argument – even 'economic rationalism' – is irrelevant to them. In positions of power, they frustrate any changes that threaten to close down conflict.[126]

The last finding are apposite to ongoing forestry conflict in Tasmania (as outlined at 1.4.6.4 and 1.7), particularly recent attempts to rescind World Heritage listed forests

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[123] Judith Ajani, *The Forest Wars* (Melbourne University Press, 2007), 5.
[124] Ibid 5.
[125] Ibid 5.
[126] Ajani, above n 123, 5.

(see Chapter 5). Others have also criticised the RFA process, from both economic[127] and governance[128] perspectives, as entrenching, rather than resolving, forest conflict.

This thesis focuses on law rather than the fields covered by Ajani, and more on native forests than plantations. While the RFA law this thesis examines extends to plantations, the case studies examined here relate to native forest logging. The current law regarding RFA exceptionalism is part of the existing power structure (or obstruction to change) from which Ajani urges Australia to move beyond.

1.4.7 Environment v Industry Protection: One Way Legal Certainty

Another theme with wider, ongoing relevance came from Forsyth who compared enforceability (or lack thereof) for Victorian environmental controls over forestry with that of resource security contracts between the State government and industry. She explained that State-based instruments such as forest management plans and the Code of Forest Practices are often 'either not legally enforceable, are without penalties or are, in practice, impossible to enforce.'[129] Whereas:

> In contrast, legal certainty does exist to enforce resource security contracts between the State government and industry. These contracts are long term, binding and provide compensation measures to protect industry should the government retract the supply of wood.[130]

[127] Gary Musselwhite and Gamini Herath, 'Australia's Regional Forest Agreement Process: Analysis of the Potential and Problems' (2005) 7(4) *Forest Policy and Economics* 579.
[128] Marcus B. Lane, 'Decentralization or Privatization of Environmental Governance? Forest Conflict and Bioregional Assessment in Australia' (2003) 19(3) *Journal of Rural Studies* 283; see also Marcus B Lane, 'Regional Forest Agreements: Resolving Resource Conflicts or Managing Resource Politics?' (1999) 37(2) *Australian Geographical Studies* 142.
[129] Forsyth, above n 49, 338.
[130] Ibid 338.

This disparity between the relative (un)enforceability of environmental management prescriptions for forestry compared to binding contractual rights granted by a State to forestry companies applies more widely:

- at State level, as Forsyth accurately identifies (and see Chapter 4); but also
- to the RFA Act and RFAs, as the thesis demonstrates.

RFA exceptionalism exempts forestry from enforceable environmental law (eg the EPBC Act), in favour of RFAs, the environmental provisions of which are generally contained within parts of the RFA expressed to be unenforceable (Chapter 6).

Chapter 3 also explains how the RFA Act aims 'to give effect to certain obligations of the Commonwealth under Regional Forest Agreements',[131] RFAs being made 'for the purpose of providing long-term stability of forests and forest industries'.[132] Hence, RFA Act s 8 meets industry calls for 'resource security'[133] by endeavouring to lock in compensation for the affected State/industry if an Australian Government reduces forestry resource availability, eg through further forest reservations. This privileges industry's desire for long term certainty of wood supply (understandable given the scale of investment involved in, say, a pulp mill) over a future government (presumably driven by citizens' democratic preferences) shifting away from industry support and towards more conservation and runs counter to inter-generational equity.

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[131] *Regional Forest Agreement Act 2002* (Cth) s 3(a).
[132] *Regional Forest Agreement Act 2002* (Cth) s 4 definition of '*RFA* or *Regional Forest Agreement*'.
[133] National Association of Forest Industries (NAFI) in Gardner, above n 53. Cf Tony Bartlett, 'Regional Forest Agreements — A Policy, Legislative and Planning Framework' (1999) 16 *Environmental and Planning Law Journal* 328 of whom McDonald, above n 63, 332-3, n 137, stated:

> Bartlett asserts that the *Regional Forest Agreement Bill* fails to provide adequate safeguards for conservation outcomes because while it makes provision for compensation payments in cases of security being lost, there are no equivalent provisions guaranteeing ongoing protection of environmental values: [Bartlett, 337].

1.5 Research Questions and Hypotheses Summary

To meet its objective, the PhD develops two research questions (RQs) and associated hypotheses designed to test them. These form part of the thesis methodology fully set out in Chapter 3. Its section 3.5 develops and sets out the RQs and hypotheses and explains their significance. In brief, RQ1 and RQ2 and associated hypotheses (H1 and H2) are designed to test whether, given RFA exceptionalism, the EPBC Act and RFA Act regimes provide sufficient legal protection for Australian forests and their environmental values. In summary, they imply that, to be sufficiently protective:

1. RFAs must fulfil the justification for RFA exceptionalism claimed by Australia's federal and State governments in the SOFR.[134] That claim, in short, is that RFA's provide equivalent environmental protection to the EPBC Act.

2. The forestry legal regime under the EPBC Act and RFA Act must enable the Australian Government to fulfil its responsibility to ensure Australia's obligations under relevant MEAs are performed in good faith.[135]

If RFA exceptionalism causes failure of these tests, then it is, respectively: (1) based on a false premise, or (2) placing Australia in breach of international law.

The SOFR prefaces its equivalence claim (1 above) by noting the EPBC Act focuses on protecting MNES. That is, indeed, the EPBC Act's first-listed statutory object.[136] Most MNES are defined by reference to an MEA. The RQs are thus linked in that, if the legal regime fails the international law test 2 due to RFA exceptionalism, then

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[134] Montreal Process Implementation Group for Australia, above n 8
[135] Required for Australia meet the fundamental international law duty of *pacta sunt servanda*, codified in the VCLT.*Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980); see 1.2.1 and Chapter 2.
[136] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(a).

there is a strong argument that RFAs are not (in that respect) providing equivalent environmental protection to that of the EPBC Act. Accordingly, for much of the thesis, legal argument can be used to test both RQs and hypotheses simultaneously.

1.5.1 SOFR Claim: RFAs Provide EBPC Act Equivalent Protection

RQ1 derives from the SOFR, a report carrying the weight of being '[p]repared by the Montreal Process Implementation Group for Australia on behalf of the Australian, state and territory governments.'[137] The SOFR contains the following short entry under the heading '*Environment Protection and Biodiversity Conservation Act*':

> Australia's *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) applies to matters of national environmental significance, such as... The Act came into force in July 2000 and was amended in December 2006. *The comprehensive assessments undertaken as part of the RFA process mean that RFAs are regarded as providing an equivalent level of protection to that provided by the EPBC Act. Therefore forestry operations undertaken in RFA areas do not require approval under the Act.*[138]

1.5.2 Research Question 1 (RQ1)

RQ1 tests the SOFR statement. It asks:

RQ1: Is the SOFR statement correct? That is, do the comprehensive assessments undertaken as part of the RFA process mean that RFAs provide an equivalent level of protection to that provided by the EPBC Act, thereby justifying the regime whereby forestry operations undertaken in RFA areas do not require approval under the EPBC Act?

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[137] Montreal Process Implementation Group for Australia, above n 8, i.
[138] Ibid 186.

1.5.3 Research Question 2 (RQ2)

RQ2 asks if the RFA exemptions from the EPBC Act undermine Australia's implementation of certain MEAs, preventing the Australian Government from ensuring compliance with its treaty obligations (as the *VCLT* requires: see 1.2.1).

RQ2: Does the extent of environmental protection prescribed by the TRFA enable the Australian Government to ensure fulfilment of its obligations under the international environmental conventions implemented by the EPBC Act?

1.5.4 Hypothesis 1 (H1)

It will be hypothesised that both the RQs are answered in the affirmative, then the thesis will attempt to negate both hypotheses. Hence, H1 hypothesises:

H1: The SOFR statement is correct, ie: The comprehensive assessments undertaken as part of the RFA process mean that RFAs provide an equivalent level of [environmental law] protection to that provided by the EPBC Act. Therefore [this justifies RFA exceptionalism whereby] forestry operations undertaken in RFA areas do not require approval under the EPBC Act.

The 'level of protection provided by the EPBC Act' implicitly refers to that the EPBC Act would provide from forestry operations[139] *if* they required approval under the Act, ie *but for* EPBC Act ss 38-42 and RFA Act s 6(4) ('RFA exemption provisions'). Hypothesising an affirmative answer to RQ1 in Tasmania, H1 posits that the TRFA provides for forestry operations an equivalent level of [environmental] protection to that the EPBC Act would provide *but for* RFA exemption provisions.

[139] 'forestry operations' are defined in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40(2).

1.5.5 Hypothesis 2 (H2)

H2 hypothesises that RQ2 is answered in the affirmative:

H2: The EPBC Act, RFA Act and RFAs provide sufficient environmental protection for the Australian Government to ensure that forestry operations do not derogate from fulfilment of its international obligations set out in the relevant MEAs implemented in Australian law by the EPBC Act.

The thesis will argue against H1 and H2. Its case study chapters argue that environmental values of MNES are not protected by RFAs to the extent that they would be if the EPBC Act applied without its RFA exceptions, and that the legal regime does not meet Australia's environmental treaty commitments.

1.6 Method

In order to answer its RQs, the thesis adopts 'a strict doctrinal approach [which] relies predominantly on self-informed analysis of legislation and judicial decisions from the superior courts',[140] complemented by the addition of case study analysis (see the next section). It thereby applies the law from the international level through Australia's domestic implementation to ground level in Tasmania.

As this chapter's literature review explains, academic literature searches of the EPBC Act-RFA Act nexus since the Acts commenced found quality, rather than quantity. Given the relative dearth of applicable academic literature, this thesis' strict doctrinal approach is apt for its legal analysis of the EPBC Act and the RFA Act. This

[140] British Library, *Socio-legal Studies: an Introduction to Collections* The British Library Board <http://www.bl.uk/reshelp/findhelpsubject/busmanlaw/legalstudies/soclegal/sociolegal.html>. See also, Emerson H Tiller and Frank B Cross 'What is Legal Doctrine?' (2006) 100(1) *Northwestern University Law Review* 517, 518.

doctrinal approach also best suits the thesis' focus on procedural effectiveness (see 1.4) and answering RQ1 given it calls for comparative analysis of legislation, which is informed by Federal Court judgments examined as case studies in Chapters 6 and 7. For consistency, a similar approach is taken to key articles of relevant international treaties, against which Australia's legal regime is assessed for RQ2.

The thesis' analysis is focused mainly on domestic, rather than international, law. First, the former is the more complex in its domestic application, occupying the 'lion's share' of the case studies' Federal Court judgments.[141] Second, domestic law also proved the stronger determinant of answers to the RQs and hypotheses. That is, ascertaining the extent and implications of RFA exceptionalism (as interpreted by the High Court and Full Court of the Federal Court) demonstrates that it has produced a legal regime inadequate to safeguard certain of Australia's treaty obligations.

The thesis analyses relevant objects and associated substantive provisions of the EPBC Act and RFA Act in Chapters 2 and 3 respectively. Chapters 3-4 explain, at federal and State levels respectively, the legislation governing forestry. RQs and hypothesis developed in Chapter 3, are tested these across MNES affected by forestry in Tasmania (Chapters 5-6). Chapter 7 examines the special treatment accorded forestry in EPBC Act EIA. Chapter 8 answers the RQs, draws together cross-cutting themes and makes law reform recommendations. The latter are consistent with the active research approach taken to this PhD. Chapters 2, 5, 6 and 7 move from key treaty obligations to their domestic implementation in the EPBC Act. Chapters 5-7 extend their focus to applied case study analysis of RFA exceptionalism in practice in Tasmania, so as to 'ground-truth' the hypotheses.

[141] Of the judgments examined in case studies, only the trial judge in *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34 (Marshall J) (Chapter 6) paid more than lip-service to international law; and that decision of his was the one over-turned on appeal.

1.7 Case Study Justification

Chapters 5-7 each conclude with a high profile Tasmanian case study of international significance (covering relevant MNES). Case studies are commonly employed in qualitative research, including in PhD theses. For example, Prof Simon Marsden, who carried out case studies as a PhD candidate, noted that the case study

> is recognised as the best approach to comparative, exploratory evaluations, especially where procedures and contexts are so closely linked that the boundaries of any study may be unclear. Case study research is extremely flexible, and the use of multiple case studies makes any evidence obtained more compelling.[142]

This thesis involves comparative evaluations of the EPBC Act and RFA Act using multiple case studies. The case studies selected for this thesis are each high profile Tasmanian-based examples of forestry disputes involving MNES (World Heritage or threatened species), so as to enable testing of the thesis' hypotheses. Moreover, consistently with the interpretive case study selection method, each case study chosen here is also important in its own right, eg as a high profile dispute, involving new World Heritage issues or Federal Court litigation applying RFA exceptionalism. Finally, the SOFR 'provides the most comprehensive review yet of the state of our forests'.[143] It also uses short case studies (in addition to other methodologies unsuited to this PhD), confirming them as an appropriate technique for this qualitative thesis.

1.7.1 Case Study Location: Tasmania

Since each RFA involves only one State, case study analysis is best grounded in one State jurisdiction. The selected State is Tasmania, where forestry conflicts have had highest profile and have generated the leading Federal Court forestry cases.

[142] Marsden, above n 48, 11 (citations omitted).
[143] Montreal Process Implementation Group for Australia, above n 8, iii.

Tasmania was the last State to sign the NFPS and to agree an RFA with the Australian Government. Since the TRFA applies across all of Tasmania (unlike those of NSW and Victoria), it applies consistently to forestry relevant to each case study.

After federal and State statute law analysis across Chapters 2-4, the thesis tests the hypotheses in the context of specific EPBC Act MNES. Chapters 5-7 then add key Tasmanian case studies of international significance. These studies focus on specific iconic locations or keystone species constituting MNES. Each would be protected by the EPBC Act but for its RFA exemptions. In Chapters 5-7, the impact of the RFA exemptions on MNES are examined via corresponding case studies.

1.7.2 Importance of Forests to Tasmania

Another reason for choosing Tasmania as the case study jurisdiction is that its ongoing forest conflict impacts the island State's sense of place, politics, and law. People perceive environmental impacts through their own experiential lens:

> Just because something is socially interpreted, does not mean it is unreal. Pollution does cause illness, species do become extinct, ecosystems cannot absorb stress indefinitely, tropical forests are disappearing. But people can make very different things of these phenomena and – especially – their interconnections, providing grist for political dispute.[144]

Indeed, disputes over Tasmania's iconic forests have raged so long they are often summarised in militaristic terms such as 'The Forest Wars' and 'wilderness battles'.[145] Wilderness 'plays a central role in formal Tasmanian politics … [having]

[144] John S Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford University Press, 2nd ed, 2005), 12.
[145] See, eg: Ajani, above n 123; Libby Lester, *Giving Ground: Media and Environmental Conflict in Tasmania* (Quintus Publishing, 2007); and Greg Buckman, *Tasmania's Wilderness Battles: A History* (Allen & Unwin, 2008).

… impacted on most state elections since 1973, and several federal elections'.[146] Hence, '[t]he description of Tasmania as the only political system in the world primarily informed by the environment'[147] remains apt two decades later. This makes Tasmania a crucible of conflict – and a unique laboratory.

1.7.3 Scale of Woodchipping for Pulpwood in Tasmania

Another reason for choosing Tasmania as the jurisdictional base for case studies is the scale and dominance of its pulpwood industry, relative to both the rest of Australia and island's small land area. Amongst the SOFR's extensive data is some relating to pulpwood, illustrating the dominance of Tasmanian pulpwood harvest relative to other, much larger, Australian States. The annual 6 million cubic metres of logs harvested in Tasmania in 2006-07 approximately matched the volumes in each of NSW and Victoria.[148] The SOFR also reported that 'Tasmania is the country's *major provider* of *private pulpwood*; ....'[149]

In public native forests, Tasmania's average annual pulpwood harvest also dwarfed every other state. In the final SOFR reporting period (2001-02 to 2005-06) Tasmania's harvest approached 3 million cubic metres, *exceeding the combined total harvest from the rest of Australia*:[150]

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[146] Ibid.
[147] Ibid citing Peter Hay, 'Destabilising Tasmanian Politics: The Key Role of the Greens' (1991) 3(2) *Bulletin for the Centre for Tasmanian Historical Studies* 60.
[148] Montreal Process Implementation Group for Australia, above n 8, Figure 55 'Volume of logs harvested, 2001-02 to 2006-07', 126.
[149] Ibid 60.
[150] Ibid, Figure 39 'Average annual pulpwood harvest from multiple-use public native forests, by *SOFR* reporting period', 61.

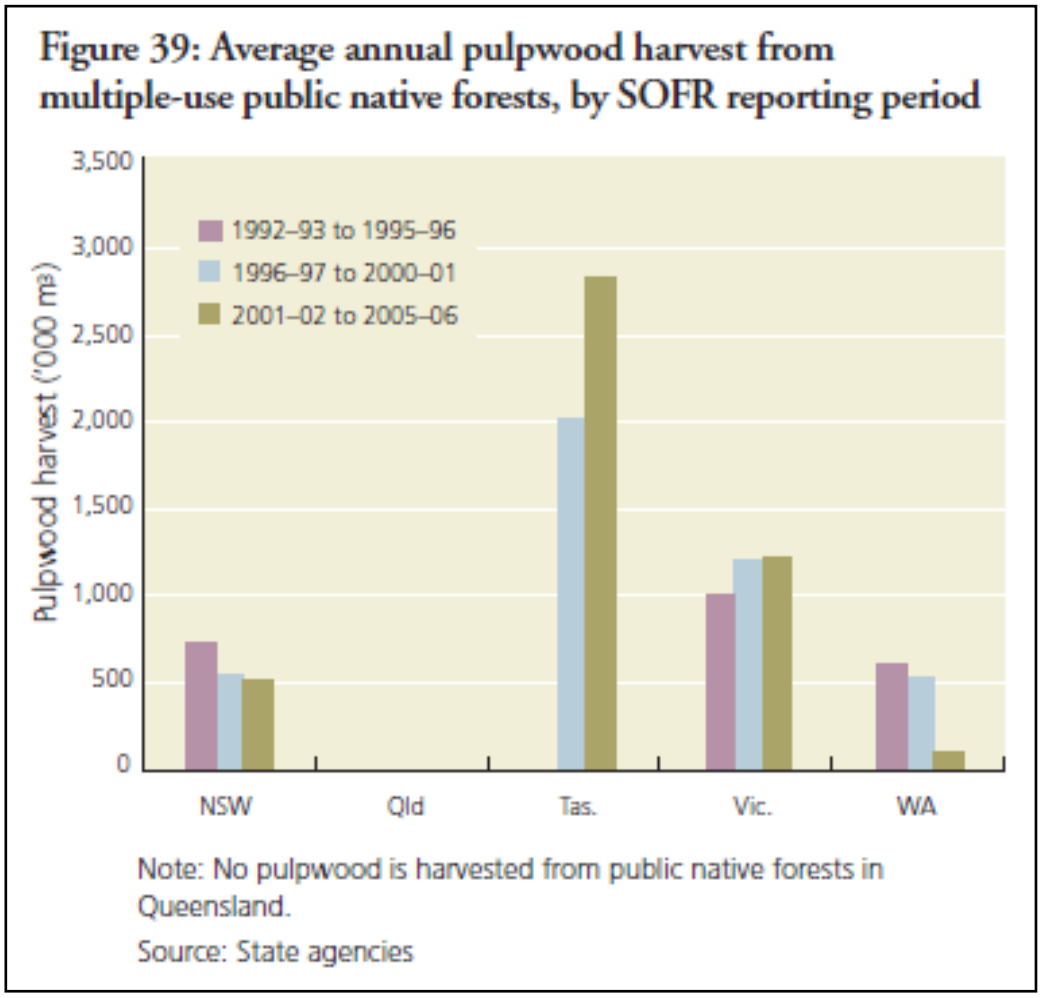

Figure 1.1**:** SOFR, 61, Figure 39: 'Average annual pulpwood harvest from multiple-use public native forests, by SOFR reporting period'.

This helps to explain, both:

a) concerns over Tasmania's export woodchip industry's scale and impacts (environmental, and wastage of potentially higher value wood); and

b) economic reasons behind the push for Gunns Limited (by then an export woodchip giant) to build one of the world's largest pulp mills in Tasmania (the case study focus of Chapter 7), to value-add to its woodchip exports.

1.8 Content and Structure

The remainder of this chapter charts the course of the subsequent chapters and the scope of the thesis, then summarises its key findings. Chapter 2 provides a 'top-down' (starting from international law) analysis of how relevant MEAs are implemented in Australian law. The chapter commences with Australia's legal duty to perform its treaty obligations,[151] which is the Australian Government's responsibility. The chapter then explains how relevant MEAs are implemented through the EPBC Act: a product of Australian federalism, relying for its constitutional validity largely on the Commonwealth's external affairs power. The Act's origins in the Intergovernmental Agreement on the Environment (IGAE)[152] are explained, as are key changes to federal environmental law (eg removal of 'indirect' constitutional triggers) brought about by the Act replacing a suite of predecessor statutes. The Act's scheme as applying to most industries (but not forestry) is explained, to be further particularised in respect of specific MNES in Chapters 5-7.

Chapter 3 turns to forestry, explaining how RFA exceptionalism excludes it from the EPBC Act, in favour of the RFA Act regime. That Act aims, inter alia, 'to give effect to certain aspects of … the National Forest Policy Statement'.[153] However, those aspects of the NFPS protect industry more than the environment. The RFA Act under delivers on other national goals in the NFPS. Hence, Ajani states, 'Most Liberal and Labor politicians… continued to falsely legitimise the regional forest agreements as the outcome of an intergovernmental agreement.'[154] Whilst, RFAs are, by definition,

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[151] under the doctrine *pacta sunt servanda* enshrined in the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
[152] Commonwealth of Australia, *Intergovernmental Agreement on the Environment*, 1 May 1992 (a copy of which is set out in the *National Environment Protection Council Act 1994* (Cth) Schedule).
[153] *Regional Forest Agreements Act 2002* (Cth) s 3(b).
[154] Ajani, above n 123, 230.

bilateral intergovernmental agreements, they jettison key NFPS goals (eg, ensuring Australia fulfils its MEA obligations) in favour of 'resource security'. The RFA Act grants durability[155] of resource security by legislating compensation requirements[156] to future-proof RFAs against the risk of later reserves. Chapter 3 also develops the thesis' RQs and hypotheses tested in subsequent chapters.

Chapter 4 examines the FPST, the State's system regulating forestry, upon which RFA exceptionalism leaves the federal government also dependent. One of the FPST's design flaws (apparent from its objects and statutes) is its lack of sufficient safeguards for regulation and enforcement independent of regulatees. Chapter 4 also explores regulatory theory insofar as relevant to regulatory capture, of which the FPST shows signs. The Chapter 8 argues that the RFA regime is worse, constituting systemic capture of the regulatory scene, demonstrated through the case studies.

Chapters 5 and 6 test the thesis' hypotheses in the context of the two MNES most impacted by Tasmanian forestry, respectively: World Heritage and threatened species. Given the VCLT duty of treaty performance, Chapters 5, 6 and 7 traverse a hierarchy from international law to Tasmania, encompassing:

- relevant treaties imposing international legal obligations;
- their implementation by the EPBC Act; then

[155] Goals of the NFPS under the heading 'Integrated and coordinated decision making and management' include land use decisions which:
- 'reduce fragmentation and duplication … between the states and the Commonwealth'; and
- 'improve interaction between forest management agencies in order to achieve [agreement and durability]': *SOFR*, xiv.

[156] *Regional Forest Agreements Act 2002* (Cth) s 8.

- summarising the combined application of the EPBC Act and RFA Act to a Tasmanian forestry case study of significant impacts on one or more MNES.

Each of these chapters then uses its high profile Tasmanian case study to test the hypotheses by examining controversies over forestry affecting, respectively: the TWWHA; and endangered species in the Wielangta Forest. Chapters 5 and 6 each demonstrate adverse implications for their MNES due to the exemption[157] of RFA forestry operations from the protections in EPBC Act Pt 3.

Chapter 7 extends the thesis' analysis to an *additional* manifestation of RFA exceptionalism: EPBC Act s 75(2B). It applies to the Minister's 'controlled action'[158] decision, as to whether or not an action is likely to significantly impact on the matter protected by a provision of Pt 3.[159] This key threshold decision determines whether an action triggers the EPBC Act, so as to require approval under it. In making their 'controlled action' decision, 'the Minister must consider all adverse impacts (if any) [of the action] on the matter protected by each provision of Part 3'.[160] However, s 75(2B) prohibits the Minister from considering 'any adverse impacts of' any RFA forestry operation'[161] to which EPBC Act s 38 or s 39 applies (see the Appendix). Subsection 75(2B) was inserted into the EPBC Act during the assessment process for Gunns Limited's proposed pulp mill. The Federal Court case regarding federal EIA of this controversial project is the Chapter 7 case study.

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[157] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 38-42; *Regional Forest Agreements Act 2002* (Cth) s 6(4).
[158] 'controlled action' has the meaning given by *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 67: in effect it is an action likely to significantly impact on the matter protected by *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Pt 3 for a MNES.
[159] ie the Minister's decision under EPBC Act s 75. The 'matter protected by a provision of Part 3' has the meaning set out by s 34, eg 'the world heritage values of a declared World Heritage property'.
[160] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2)(a).
[161] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2B).

The concluding Chapter 8 considers relevant RFA recommendations from Senate and independent statutory reviews of the EPBC Act, and the Australian Government's refusal to address calls for statutory reform of RFA exceptionalism. It then draws together themes emerging from the thesis' analysis to answer the RQs. The Appendix sets out, for easy reference, extracts of the EPBC Act and RFA Act enacting RFA exceptionalism, other useful statutory provisions and maps.

1.9 Scope

The scope of this study and resultant thesis is limited in discipline, geography and time. It is a legal thesis, focused on Australian federal law, albeit by reference to Australia's implementation of certain treaty obligations. The literature search focused on academic legal literature concerning RFAs (summarised in 1.4 and Chapter 3), specifically their interaction with the EPBC Act. There is a much larger body of legal literature focused on the EPBC Act, and the international conventions it implements, with which the thesis does not deeply engage (beyond some in Chapter 2) since the domestic statute and case law around RFA exceptionalism produce results sufficiently radical to demonstrate clear treaty breaches.

Since the case studies are grounded in Tasmania (though with implications and significance beyond), Chapter 4 examines its relevant State forestry law. Relevant foundational environmental regulatory theory is considered in Chapter 4, but no more than necessary to assess the Tasmanian law focused upon. In particular, Chapter 4 supplements its analysis of State forestry law by using the concepts of:

- regulatory and systemic capture to explain broadscale environmental exemptions for forestry from both the EPBC Act and RMPST; and

- Gunningham's multi-faceted enforcement pyramid to empower third parties.[162]

The thesis' evidence of capture heightens the importance of the multi-faceted enforcement pyramid as a potential regulatory mechanism to help combat capture.

Temporally, the study period extends across the first decades of the EPBC Act then RFA Act, though with particular focus (in chapters 6 and 7) on federal litigation during 2006-2007. The RFA Act has remained largely unchanged since its passage in 2002. The EPBC Act has seen various amendments, particularly in 2006 which included insertion of s 75(2B), examined in Chapter 7.

The law stated in this thesis is current as at 1 July 2013. Legal developments and literature beyond that date are not included except as referenced in Chapter 5 regarding efforts by the Liberal Party (now governing Australia) to partially rescind a World Heritage extension accepted by the World Heritage Committee in June 2013.

1.10 Conclusion

In answer to RQ 1, the thesis demonstrates that RFAs and their Act do not, as claimed by Australia's federal and state governments and forestry industry (see 1.5.1), provide environmental law protection equivalent to the EPBC Act.

Specifically, in relation to RQ 2, RFAs do not give the additional legal protection beyond State law which the EPBC Act provides for its MNES. Since MNES impacted by domestic forestry are defined by reference to major MEAs, RFA exceptionalism prevents the Australian Government from ensuring that forestry

[162] Neil Gunningham, Martin Phillipson and Peter Grabosky, 'Harnessing Third Parties as Surrogate Regulators: Achieving Environmental Outcomes by Alternative Means' (1999) 8 *Business Strategy and the Environment* 211.

operations do not breach the international obligations they impose. The thesis thus finds support for its hypotheses and answers the RQs in the negative.

The conclusions of relevant chapters and of the thesis itself recommend law reform to address the main shortcomings identified. Such reform is a necessary, albeit not sufficient, condition to ensure Australia fulfils its environmental treaty obligations by adequately protecting from forestry impacts, at the very least, MNES. Given that the RFA regime does not provide equivalent protection to the EPBC Act, the simplest way to achieve this is to apply the EPBC Act to forestry, by repealing provisions of the EPBC and RFA Acts which currently entrench RFA exceptionalism.

That would enable the Australian Government (or third party 'surrogate regulators') to use the EPBC Act to rein in recalcitrant forestry operations where necessary to better protect MNES; and thereby uphold Australia's treaty obligations on which they are founded.

Chapter 2 EPBC Act Legislative Framework

2.1 Introduction

This chapter analyses the relevant legal and political background to the EPBC Act and the statutory framework through which it provides for environmental protection so as to implement in domestic law Australia's international obligations under major environmental treaties. Performance of treaties is required by the over-arching rule of international treaty law *pacta sunt servanda* with which the chapter commences. It then analyses, in turn: underlying constitutional law and political patterns in Australian Federalism which combined to generate the EPBC Act; and key elements of the Act itself.

The analysis demonstrates that the Act is a product of both Australian constitutional law and politics, particularly co-operative federalism. The EPBC Act is built on sound constitutional foundations (but could be extended much further). Pre-existing national, topic-specific, environmental statutes had been used, on occasion, to over-ride State Governments committed to resource development (for example, during 1980s World Heritage disputes between the Australian Government and Tasmania, and subsequently Queensland). These pre-existing statutes were demolished to make way for the EPBC Act, which brings the topics they covered under the roof of a single, consistent statute.

Unlike its predecessor statutes, the EPBC Act is very much a product of co-operative federalism, agreed between conservative Commonwealth and State governments (as is the RFA regime explained in Chapter 3). Whether the EPBC Act and the RFA Act adequately implement into Australian law MEAs relevant to forestry is the subject of Research Question 2 developed in Chapter 3. This thesis will demonstrate that Australia's international environmental obligations are not adequately implemented in domestic law.

The chapter begins, in section 2.2, with the fundamental duty of nation States under international law to perform their treaty obligations in good faith, as required by the foundation principle *pacta sunt servanda*. Notwithstanding this international norm, within Australian *domestic* law the mere signing and subsequent ratification of a treaty (which can be done by the national government: section 2.3.1 below) is a necessary, but not sufficient, condition to make it legally enforceable. Achieving that result requires the treaty to be implemented in Australia, generally by legislation.

Enacting suitably proportionate legislation is within the Australian Parliament's external affairs power[1] (section 2.3.2 below). This is so even where, in so doing, the federal implementing legislation over-rides contrary State law[2] on a subject area which would otherwise (absent the treaty) fall outside the Commonwealth's constitutional power and hence remain within the residual power of the States. The federal Parliament's expansive legislative capacity to implement Australia's international obligations was upheld by the High Court of Australia in three key World Heritage cases during the 1980s, each of which the Court determined in favour of the Commonwealth[3] (see section 2.4.4 below, and further in Chapter 5).

These hard-fought High Court World Heritage cases were won by the Hawke Labor Government over one decisive decade. They revealed the Commonwealth's expansive constitutional power, particularly under its external affairs power, enabling it to overcome the absence of the word 'environment' in the *Australian Constitution*. Its constitutional *capacity* for environmental regulation so confirmed, the Commonwealth subsequently made the policy determination as to how, and to what extent, it would *exercise* that legal authority. It did so during the 1990s through the development and passage of the EPBC Act. The Act can be seen as a product of the

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[1] *Australian Constitution* s 51(xxix).
[2] Pursuant to *Australian Constitution* s 109.
[3] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Richardson v Forestry Commission* (1988) 164 CLR 261 ('*Tasmanian Forests Case*'); *Queensland v Commonwealth (1989) 167 CLR 232 ('Wet Tropics Case').*

aforementioned constitutional law tempered with Australia's 1990s politics, which came to be dominated by conservative governments at State and (following the Howard Government's election in March 1996) national level. To elucidate the political backdrop to the EPBC Act, which shaped its formulation, section 2.4 charts Australia's federal environmental statutes preceding the EPBC Act alongside the Prime Ministers whose governments enacted or administered them.

In this context, the EPBC Act can be viewed as:

- a staged retreat by the Commonwealth from Prime Minister Whitlam's 1970s legislation and Prime Minister Hawke's 1980s High Court victories; and/or

- a structured product of co-operative environmental federalism, initiated under Prime Minister Prime Minister Keating then followed through to federal legislation under Prime Minister Howard to logically consolidate the national government's environmental sphere of influence.

This chapter finds evidence supporting both propositions, their key common feature being the EPBC Act's bilateral agreement mechanism through which the Australian Government can delegate and potentially devolve environmental regulation to the States. Chapter 3 will compare the RFA regime in which context the words 'delegate' or 'devolve' are, the thesis will argue, more aptly replaced by 'abandon' or 'abdicate' in terms of its international obligations.

The EPBC Act itself is analysed in section 2.5, with particular attention to its objects and overall scheme for environmental protection, EIA and implementation of environmental treaty commitments. The Act narrowed the focus of Commonwealth environmental regulation by removing broad, 'indirect' Constitutional triggers for federal environmental approval in predecessor legislation. These were replaced by specified 'matters of national environmental significance' (MNES), most based on the external affairs power. In this way, the Act, inter alia, implements Australia's international obligations under a number of environmental treaties.

The focus of this thesis is on the MNES subject to Australia's international obligations which are most susceptible to impact by forestry operations in Tasmania: World Heritage and threatened species. Section 2.5 explains the EPBC Act's over-arching legal framework for environmental assessment and approval of actions likely to significantly impact MNES. This provides a foundation for the research questions and hypotheses developed in Chapter 3, and later case studies in Chapters 5-7 which test those hypotheses. Section 2.6 concludes the chapter, while section 2.7 leads into the next chapter.

2.2 Vienna Convention Duty to Perform Treaties

The *Vienna Convention on the Law of Treaties*[4] codifies over-arching rules of international treaty law and, as such, 'has been applied without question in many international and national judicial decisions'.[5] This section:

- Firstly, explains how the *Vienna Convention on the Law of Treaties*[6] codifies a fundamental, long-standing rule of treaty law ('*pacta sunt servanda*') requiring States to perform treaties to which they are party in good faith.[7]

- Secondly, shows how tightly the *Vienna Convention* confines a State that might seek to invoke a provision of its internal law to invalidate its consent to a treaty. Section 2.2.2 below demonstrates how the *Vienna Convention* prevents a State from invoking for this purpose all but a 'manifest' violation of 'a rule of its internal law of fundamental importance'.[8] That leaves no

[4] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
[5] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & the Environment* (Oxford University Press, 3rd ed, 2009), 16.
[6] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
[7] Ibid art 26.
[8] Ibid art 46.

'wriggle room' for Australia to do other than perform in good faith its treaty obligations relevant to this thesis.

- Thirdly, the *Vienna Convention's* keyrule of treaty interpretation is set out in section 2.2.3 below for application to specific treaty provisions in later chapters.

2.2.1 Duty to Perform Treaties: *Pacta Sunt Servanda*

Under the heading '*Pacta sunt servanda*' (ie treaties are made to be kept),[9] the *Vienna Convention on the Law of Treaties*[10] declares that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'[11] The *Vienna Convention* thereby codifies the long-standing *pacta sunt servanda* rule. Professor Rothwell et al describe it as 'one of the most important in treaty law articulating the fundamental proposition that State parties are to perform their treaty obligations in good faith.'[12] Other eminent jurists have gone so far as to describe it as 'the superior norm'[13] of treaty law and 'an absolute postulate of the international legal system'.[14] Professor Rothwell et al state that:

> A clear illustration of a breach of this rule would arise in the case of a human rights treaty where a State party ignored its obligations to respect and implement human rights provisions.[15]

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[9] Ibid art 26.
[10] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).
[11] Ibid art 26.
[12] Donald R Rothwell et al, *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press, 2011), 133.
[13] Anzilotti, *Corso di Diritto Internazionale* (3rd ed, 1928) Vol I, 43 quoted in Ivan A Shearer, *Starke's International Law* (Butterworths, 11th ed, 1994), 22.
[14] Ibid.
[15] Rothwell et al, above n 12, 133.

This thesis, by its Research Question 2 (RQ2), will consider an analogous issue: is Australia breaching the *pacta sunt servanda* rule in the case of certain multilateral environmental agreements (which the EPBC Act purports to implement) by ignoring its obligations to respect and implement environmental protection provisions of those MEAs in relation to RFA forestry operations?

2.2.2 Internal Law No Excuse for Failure to Perform Treaty

Other articles of the *Vienna Convention on the Law of Treaties* (VCLT) expressly preclude a State Party (including a Federation such as Australia) from claiming that its domestic law (eg the RFA Act or Tasmanian law) derogates from its duty to perform a treaty, across its territory. To this end, the VCLT provides that:

- 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.'[16]

- 'Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory…'[17]

Accordingly, neither:

- a resource management regime enshrined in national law, such as the RFA Act; nor

- sub-national (eg State or Territory) law

can detract from Australia's international duties of nation-wide treaty implementation, unless excused by article 46.

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[16] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 27.
[17] Ibid art 29.

Article 46 provides Australia with no such excuse. Headed 'Provisions of internal law regarding competence to conclude treaties', it provides:

> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.[18]

Analysis of Australia's federal framework below will show no such violation of Australian 'internal law regarding competence to conclude treaties' such as those implemented by the EPBC Act, and particularly no violation meeting the art 46 requirements that it be 'manifest' and concern a rule of 'fundamental importance'. On the contrary, it will be seen that the Australian Government is entitled to enter into treaties and the Australian Parliament to implement them pursuant to its external affairs power.[19]

Moreover, Australia ratified the treaties relevant to forestry examined by this thesis *before* Acts such as the EPBC Act and RFA Act (implementing RFA exceptionalism) were passed. This is further reason why those statutes could not be invoked by Australia to vitiate its consent to be bound by the treaties, nor its *pacta sunt servanda* duty to perform them 'in good faith.'[20]

The reverse is much more accurate. If the above Acts' provisions for RFA exceptionalism obstruct Australia's implementation of its international environmental treaty obligations, then *pacta sunt servanda* and the *Vienna Convention's* codification thereof renders it incumbent on the Commonwealth to

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[18] Ibid art 46.
[19] *Australian Constitution* s 51(xxix).
[20] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26.

amend its laws so that it is performing the treaties in good faith. Similarly, if the obstruction arises from a subnational (eg State) law, then Australia's duty to perform the treaty in good faith may require the Commonwealth to use its powers to over-ride inconsistent State laws[21] so as to ensure performance of its treaty obligations.

2.2.3 Treaty Interpretation

Finally, the *Vienna Convention* relevantly provides that a treaty should be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'[22] In later chapters, relevant articles of international environmental conventions applicable to forestry are therefore interpreted in accordance with their ordinary meaning in their context, taking account of the (generally pro-environmental) purpose of the treaty in question (particularly as expressed in its object and/or Preamble).

The *Vienna Convention* art 31(1) preface requirement that a treaty be 'interpreted in good faith' is also relevant were a nation such as Australia to instead interpret a treaty in a self-serving manner, or otherwise lacking in bona fides.

2.3 Treaty Implementation under the Australian Constitution

Australian constitutional law lays the 'ground rules'[23] for the federal-State division of legislative power, within which the nation's federation operates. The *Constitution* limits the Australian Parliament's legislative capacity to specified heads of power,[24] while the States retain residual powers. This section explains how it is now undoubted that the Australian Parliament's external affairs power[25] authorises it to

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[21] *Australian Constitution* s 109.
[22] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 31(1).
[23] Peter J Hanks, *Constitutional Law in Australia* (Butterworths, 1991), 5.
[24] eg *Australian Constitution* ss 51, 52.
[25] *Australian Constitution* s 51(xxix).

implement treaty obligations. That brings with it the capacity to over-ride State laws where necessary, since a valid Commonwealth law prevails over a State law to the extent of any inconsistency.[26]

2.3.1 Executive Power to Sign and Ratify Treaties

Signing and ratifying a treaty are actions of Australia's executive government.[27] They do not constitutionally require the consent of the Australian Parliament.[28] However, within Australian domestic law, the mere signing and later ratification of a treaty are necessary, but not sufficient, conditions to make the treaty legally enforceable in Australian law.[29] That needs the subsequent step of treaty implementation, generally requiring the executive government to persuade the federal Parliament to pass legislation.[30] Parliament will be constitutionally empowered to do so by its external affairs power[31] (examined below).

2.3.2 External Affairs Power: *Australian Constitution* s 51(xxix)

The Australian Parliament's external affairs power[32] grants it substantial capacity to enact legislation to implement treaty obligations. The Parliament's capacity to do so

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[26] *Australian Constitution* s 109.
[27] Pursuant to the *Australian Constitution* s 61: see David Clark, David Bamford and Judith Bannister, *Principles of Australian Public Law* (LexisNexis Butterworths, 3rd ed, 2010) 375.
[28] David Clark, David Bamford and Judith Bannister, above n 27, 375. Hence, in respect of treaties, the Australian Parliament exercises far less influence than, for example, the US Congress.
[29] David Clark, David Bamford and Judith Bannister, above n 27, 375, citing *Canada (A-G) v Ontario (A-G)* [1937] AC 326, 347 (PC); *Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Act Case*'), 480-82; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286-88.
[30] Treaties can also *influence* Australian: judicial approaches to administrative law (eg the 'legitimate expectation' that a decision-maker will act in accordance with a treaty that Australia has ratified which was applied in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 then countered by the federal government) and statutory interpretation. However, neither of these derogate from the fundamental proposition that full *implementation* of a treaty in Australian law generally requires the passage of legislation.
[31] *Australian Constitution* s 51(xxix).
[32] Ibid.

is now well established,[33] 'even when the subject matter of that legislation falls within areas of responsibility that have traditionally been in the possession of the States'[34] (such as natural resource management).

The Parliament is empowered to enact legislation that conforms to and gives effect to a bona fide treaty to which Australia is a party, irrespective of whether failure to do so would have constituted a contravention of the treaty.[35] The High Court's ruling on this point in the *Tasmanian Dam Case*[36] confirms that failure to enact implementing legislation that conforms to and gives effect to a treaty to which Australia is a party, can constitute a contravention of the treaty, and hence, also of the '*pacta sunt servanda*' rule[37] as discussed above at 2.2.

The proliferation of international treaties, particularly over recent decades (Australia having now ratified around 1000, most of which are still in force),[38] has thereby produced a progressive (some would say pervasive)[39] expansion of federal law-making power. In the environmental arena, this wider federal law-making capacity

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[33] Since the early 1980s: see *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Tasmanian Dam Case* (1983) 158 CLR 1.

[34] Joanna Harrington, 'The Role for Parliaments in Treaty-Making' in Hilary Charlesworth et al (ed), *The Fluid State: International Law and National Legal Systems* (2005) 3434, 39 (citing generally Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002) 774-801 and specifically the *Tasmanian Dam Case* (1983) 158 CLR 1). Harrington, 38-39, contrasts Australian constitutional arrangements in respect of treaties with arrangements in Canada. There:

> … the responsibility for treaty implementation is divided according to the constitutional division of powers. This means that treaties that fall within the federal government's areas of responsibility in terms of their subject matter must be implemented by the passage of federal legislation, while treaties within provincial areas of responsibility must be implemented by provincial legislation: *Canada (A-G) v Ontario (A-G)* [1937] AC 326, 347 (PC).

[35] *Tasmanian Dam Case* (1983) 158 CLR 1, 131, 170, 219, 258-9 (Mason, Murphy, Brennan, Deane JJ).

[36] Ibid.

[37] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26.

[38] Clark, Bamford and Bannister, above n 27, 374.

[39] See eg Guy Barnett, *A Critical Examination of the World Heritage Nomination, Lisitng and Management Procedures in Australia* (LLM Thesis, University of Tasmania, 1994); Sir Garfield Barwick, 'The External Affairs Power of the Commonwealth and the Protection of World Heritage' (1995) 25 *Western Australian Law Review* 233.

has eroded the exclusivity of the State's traditional dominion over land and resource management to an extent unforeseen at Federation. For example, as Justice Buchanan has written of the 'watershed' *Tasmanian Dam Case*:[40]

> The proposition that the Federal Parliament might, in reliance upon a treaty concerning a world heritage list maintained in another country, legislate to prohibit domestic civil engineering works being undertaken wholly within a State by the government of that State in the exercise of its own undoubted powers and capacities would, I have no doubt, have been rejected as fanciful by those debating the distribution of legislative powers at the Convention Debates.[41]

Nevertheless, the *Tasmanian Dams* judgment to that effect is consistent with the High Court's reasoning in subsequent cases, as also noted by Justice Buchanan,[42] namely that:

> To pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage. It is a mirage because the inquiry assumes it is both possible and useful to attempt to work out a single collective view about what is now a disputed question of power, but then was not present in the minds of those who contributed to the debates.[43]

Similarly, the Court has rejected the notion that the *Constitution* depends upon a 'federal balance' in the distribution of legislative power granted to the Commonwealth and that reserved to the States, preferring to determine the scope of federal legislative power from the Constitution's text.[44]

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[40] (1983) 158 CLR 1.
[41] Justice Robert J Buchanan, 'The Shifting Balance in Federal/State Relations: Its Impact on the Australian Judicial System' (2012) 31(1) *University of Tasmania Law Review* 1, 34.
[42] Ibid 35.
[43] *New South Wales v Commonwealth* ('*Work Choices Case*') (2006) 229 CLR 1, [120].
[44] Justice Robert J Buchanan, above n , 35.

2.3.3 Corporations Power : *Australian Constitution* s 51(xx)

To be supported by the external affairs power, Commonwealth legislation must be reasonably appropriate and adapted to implementing a treaty.[45] However, if part of the EPBC Act were considered disproportionate to a treaty it sought to implement, then it could potentially be supported by another head of power (for example, the corporations power).[46]

This is so due to two constitutional considerations. Firstly, there is no constitutional requirement preventing a Commonwealth Act finding support from heads of power other than that intended by Parliament:

> A law enacted by a Parliament with power to enact it, cannot be unlawful. The question is not one of intention but of power, from whatever source devised. … [A provision of a statute] can be justified, in my opinion, if it is competent under any of the powers vested in Parliament, whatever the title of the Act, and whatever indications there are in the Act as to the precise power under which it may be suggested that Parliament purported to act.[47]

Secondly, the High Court's expansive interpretation of the external affairs power is consistent with its approach to the Australian Parliament's other head of power most readily able to be used for environmental regulation, namely that with respect to corporations. Its potential utility derives from:

- the fact that most of the 'actions' the EPBC Act regulates (ie those significantly impacting MNES) are undertaken, in whole or in part, by corporations; and

- the constitutional law summarised below.

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[45] *Tasmanian Dam Case* (1983) 158 CLR 1 per Mason J.
[46] *Australian Constitution* s 51(xx).
[47] *Ex parte Walsh and Johnson; Re Yates* (1925) 37 CLR 36, 135 (Starke J).

The Constitution empowers the Australian Parliament to legislate regarding 'Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.'[48] The High Court used this 'corporations power', in addition to the external affairs power, to find for the Commonwealth in the *Tasmanian Dam Case* (the State-owned Hydro-Electric Commission (HEC) being a 'constitutional corporation').[49] However, it was the Howard Government's successful defence[50] of its *Work Choices* industrial relations legislation which saw interpretation of the corporations power specifically, and (through the Court's reasons), Commonwealth power generally, reach a new high water mark.[51]

In the wake of such High Court decisions since passage of the EPBC Act, the corporations power, in particular, could now be used to take the Act much further – if Parliament so desired – as has occurred through national work health and safety law:

> The view of the corporations power which was taken in the *Work Choices Case* left no doubt that a new era of federal legislative authority had begun. Use of that authority may be seen in the decision by the Federal government to deal nationally with occupational health and safety, a field traditionally the province of the States. The [Bill which is now the *Work Health and Safety Act 2011* (Cth) provides] model work health and safety laws throughout Australia. The initiative has the support of the States.[52]

Justice Buchanan added that analysis in the *Work Choices Case*:

> confirmed an ample source of constitutional authority to regulate very many aspects concerning and touching corporations in a way which will doubtless see s 51(xx) used as a dominant source of power hereafter in a way never envisaged in 1900.[53]

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[48] *Australian Constitution* s 51(xx).
[49] (1983) 158 CLR 1.
[50] *New South Wales v Commonwealth* ('*Work Choices Case*') (2006) 229 CLR 1.
[51] See eg Justice Robert J Buchanan, above n 42, 31-4 explaining the case and its constitutional implications.
[52] Ibid 34.
[53] Ibid 34.

The corporations power could, therefore, be used to both:

- reinforce the EPBC Act should questions arise as to its constitutional validity; and

- potentially (were Parliament willing) to strengthen/extend the EPBC Act's environmental ambit so as to overcome some of its limitations which this thesis will identify.

The *Work Choices* legislation and consequent *Work Choices Case*[54] were driven by Prime Minister Howard, a conservative lawyer long-committed to such an industrial relations system. In industrial relations, Prime Minister Howard's *Work Choices* legislation 'replaced more than a century of legislation … in a way which has radically overhauled the earlier arrangements.'[55] He thus achieved his industrial relations legislation through radical – at least in constitutional terms – Commonwealth centralisation at the expense of State industrial relations law.

By contrast, in natural resource management Prime Minister Howard was strongly committed to 'State's rights'. In particular, he opposed, from Opposition, Prime Minister Hawke's 1980s World Heritage cases; then his government pursued co-operative federalism through the EPBC Act, RFAs and the RFA Act. Howard's commitment to industrial relations reform clearly outweighed his general federalist tendencies – or perhaps he saw the end justifying the constitutional means. On natural resources, Prime Minister Howard oversaw a consistently 'States rights'/federalist approach to drafting both the EPBC Act and, as explained in Chapter 3, the RFA Act. The EPBC Act enabled delegation to the States, while the RFA Act entrenched and sought to 'future-proof' their 'resource security' under the RFA regime.

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[54] (2006) 229 CLR 1.
[55] Justice Robert J Buchanan, above n 41, 30.

2.4 Politico-Legal Context: States' Rights v National Responsibilities

Why does Australia need federal environmental legislation and oversight, rather than leaving environmental management to its States, traditionally responsible for it? One *legal* reason is to enable the national government, which is responsible for fulfilling Australia's international obligations, the legal power to ensure they are met. As explained earlier, High Court decisions involving the Commonwealth's external affairs and corporations powers in recent decades have progressively revealed an expansion of Commonwealth constitutional power beyond that traditionally understood. Whether, once seized of that power, the Commonwealth chooses to exercise it, is another issue. To illustrate the need for federal involvement *in practice*, the following brief history highlights some key Australian controversies where environmental assets of national and, in most cases, World Heritage, significance would have been gravely damaged had the Commonwealth not over-ridden the relevant State. Examples limited to the States of Queensland and Tasmania are cited below, serving to demonstrate the point. Further examples exist in other States.[56]

The following sections analyse the records of Prime Ministers over recent decades, and also usefully reveals general patterns in contemporary Australian environmental federalism, which help explain the political drivers for the EPBC Act. To that end, this section charts the environmental approach of Australian Prime Ministers since Gough Whitlam in the 1970s to draw out emerging themes. These include, since the Hawke Labor Government, a general trend away from national centralisation towards

[56] See, eg, Tim Bonyhady and Andrew Macintosh (eds), *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (Federation Press, 2010) for high profile examples of State and Territory environmental recalcitrance around Australia.

co-operative federalism in the environmental context, [57] or 'co-operative environmental federalism'.

2.4.1 Summary of Analysis

In general terms, Australia's modern national environmental politics has seen conservative (Liberal - National Party Coalition) governments (led by PMs Fraser and Howard) favour a hands-off approach to environmental management, leaving or delegating more to the States. This is consistent with the primacy they accord economic development and deregulation and (at least in environmental matters) cooperative federalism. By contrast, Labor governments led by PMs Whitlam and Hawke (though less so that of Keating – long-term Treasurer and more of an economic rationalist) were:

- more likely to favour a stronger role for more centralised national environmental leadership, and

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[57] As to the origins of co-operative environmental federalism in Australia, see, eg:
- James Crawford, 'The Constitution and the Environment' (1991) 13 *Sydney Law Review* 11;
- Phillip Toyne, *The Reluctant Nation: Environmental Law and Politics in Australia* (ABC Books, 1994); and
- Cheryl Saunders, 'The Constitutional Division of Powers with Respect to the Environment in Australia' in KM Holland, FL Morton and B Galligan (eds), *Federalism and the Environment: Environmental Policy Making in Australia, Canada and the United States* (Greenwood Press, 1996).
- For an overview of co-operative federalism research in the Australian political science context, see eg Alan Fenna, 'Federalism' in R A W Rhodes (ed), *The Australian Study of Politics* (Palgrave Macmillan, 2009) 146, 156.
- In relation to the co-operative federalist context for the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), see, eg:
  - Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 6th ed, 2006), 75-8;
  - Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 7th ed, 2010), 135-142;
  - Jacqueline Peel and Lee Godden, 'Australian Environmental Management: a 'Dams' Story' (2005) 28(3) *University of NSW Law Journal* 668, 675; and
  - Department of the Environment, Water, Heritage and the Arts (Australian Government), 'Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*: Interim Report' (Commonwealth of Australia, June 2009) <http://www.environment.gov.au/epbc/review/publications/interim-report.html>110, [2.29].

- when this led to conflict with the States, were more willing to stare them down or defend the Commonwealth's position in court.

As a broad generalisation, Australian national politics from the 1970s resembles the tide ebbing and flowing from conservative to Labor governments. In terms of environmental legislation, it has seen occasional king tides leave a statutory high water mark, such as:

- the waves of reform PM Whitlam brought (riding an incoming tide) – most of his environmental legislation lasted until it was washed away by EPBC Act (the *Great Barrier Reef Marine Park 1975* (Cth), a notable exception, remains to this day); and

- the EPBC Act, enacted under PM Howard, which has endured through governments of both major-party political persuasions.

The EPBC Act was built on the external affairs power, upheld in Hawke's High Court wins of the 1980s. But along with Whitlam's statutes it also washed away the use of indirect constitutional triggers (such as the export controls which Fraser had relied successfully relied on to halt sand-mining on Fraser Island). It also, inter alia:

- narrowed Commonwealth environmental EIA and approval powers to 'controlled actions' (ie those significantly impacting MNES);[58] and

- adopted an approach of co-operative environmental federalism, in particular through provision for bilateral agreements enabling the federal Environment Minister to delegate her/his EIA and environmental approval functions to the States.

[58] See thesis 2.5.7.

2.4.2 Traditional Position: Natural Resources States' Domain

In Australia, '[t]he management of land and natural resources, including forests, is largely the domain of the state and territory governments.'[59] Accordingly, and as the holders of residual Constitutional power, states and territories were traditionally responsible not only for natural resource management, but also for regulation of associated environmental issues. From this historical background developed a traditional political expectation (at least from State governments) that the federal government would not interfere in matters concerning "States' rights" to exploit their resources. This traditional "States' rights" approach largely prevailed in Australia until the early 1970s, but was then challenged by political and legal developments as certain environmental issues became of national and international concern.

2.4.3 1970s: Prime Ministers Whitlam and Fraser

By at least the 1970s, 'rights' to resource extraction were being questioned by popular notions of environmental stewardship emphasizing 'responsibility', including in multilateral environmental agreements such as the *World Heritage Convention*.[60] This MEA recognised iconic natural features, landscapes, and cultural heritage of international concern, and hence national responsibility, rather than merely matters for exclusively local control. The 1970s also saw sweeping change in Australia, environmental controversies and a suite of national environmental statutes.

2.4.3.1 PM Whitlam's Government

After decades of conservative national rule, the Whitlam Labor Government swept to power in December 1972 on a reformist mantra, 'It's time'. In the space of a few

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[59] *SOFR*, above n 1, xvi.
[60] See eg *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*'), art 4.

years, Whitlam initiated a wave of social and environmental law reform: the latter rewriting conventional wisdom as to State control over land and natural resources.

The early 1970s controversies over State government threats to various environmental icons (eg Lake Pedder and the Great Barrier Reef) led Whitlam to radically challenge the traditional division of environmental power between the Australian federal and State legislatures. Hence, his substantial legislative program included a number of environmental statutes such as:

- the *Seas and Submerged Lands Act 1973* (Cth);
- the *Australian Heritage Commission Act 1975* (Cth);
- the *Environmental Protection (Impact of Proposals) Act 1975* (Cth);
- the *Great Barrier Reef Marine Park 1975* (Cth); and
- the *National Parks and Wildlife Conservation Act 1975* (Cth).

These statutes were driven by the willingness of a centralist Labor Government, cognisant of a growing national environmental consciousness, to legislate in order to prevent excessive resource development or extraction by the States. For example, the impetus for the *Australian Heritage Commission Act 1975* (Cth) and the *Environmental Protection (Impact of Proposals) Act 1975* (Cth) has been attributed to the Whitlam Government's impotence in attempting (prompted by a conservation campaign) to prevent the flooding of Lake Pedder in the face of staunch determination by the Tasmanian Labor Government led by 'Electric' Eric Reece.[61]

[61] Bob Burton, 'Wilderness and Unreasonable People' in Cassandra Pybus and Richard Flanagan (ed), *The Rest of the World is Watching* (Pan McMillan, 1990) 79. See further Chapter 5 regarding Lake Pedder and the*Australian Heritage Commission Act 1975* (Cth)*Australian Heritage Commission Act 1975* (Cth) *Australian Heritage Commission Act 1975* (Cth).

Similarly, the *Great Barrier Reef Marine Park Act 1975* (Cth) imposed federal management over a massive region of what had been considered Queensland waters: stretching over 2000km along the Queensland coast (from just north of Fraser Island to the tip of Cape York), from low water out to the edge of the Great Barrier Reef (facilitating what would become for many years the planet's largest marine park). The Act was passed, primarily, in order to outlaw mining operations (eg mining the reef for limestone, and higher risk oil-drilling) on the reef, which the conservative, pro-development Queensland National Party Government of Sir Joh Bjelke-Petersen supported and conservationists had campaigned against.[62]

Audacious as these statutes seemed to many (demonstrated by the willingness of States and the Fraser Island mining company to challenge some in the High Court),[63] they stood the test of time:

- the constitutional validity of those challenged were upheld;[64]
- many were not replaced until the EPBC Act; and
- the *Great Barrier Reef Marine Park Act 1975* (Cth) endures to this day.

Whitlam's government, however, proved short-lived. Less adept at economic management than law reform, it suffered scandals and was controversially dismissed by the Governor-General, Sir John Kerr, on 11 November 1975. Kerr appointed the Opposition Leader, Malcolm Fraser, to replaced Whitlam as caretaker Prime Minister pending the holding of a general election.

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[62] For a legal overview, see, eg, Tom Baxter, 'Legal Protection for the Great Barrier Reef World Heritage Area' (2006) 3(1) *Macquarie Journal of International and Comparative Environmental Law* 67.
[63] The *Seas and Submerged Lands Act 1973* (Cth) was upheld in *NSW v Commonwealth (1975) 135 CLR 337* and the *Environmental Protection (Impact of Proposals) Act 1975* (Cth) in *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1.
[64] Ibid.

2.4.3.2 PM Fraser's Government

Malcolm Fraser won the election following 'the dismissal' of Whitlam, then for two terms pursued, what would come to be known as 'co-operative federalism'.[65] In environmental policy, Prime Minister Fraser showed far greater deference to "States' rights" than had the centralist Whitlam. For example, Fraser signed the 'Emerald Agreement' with Queensland to facilitate management of the Great Barrier Reef Marine Park, and reached the Offshore Constitutional Settlement ('OCS') at a 1979 Premiers' Conference. The OCS led, in 1980 to each State Parliament formally requesting, pursuant to the *Australian Constitution* s 51(xxxviii), that the Commonwealth enact the *Coastal Waters (State Title) Act 1980* (Cth) and *Coastal Waters (State Powers) Act 1980* (Cth).[66]

Prime Minister Fraser was much less centralist than Whitlam. Nevertheless, he did not repeal Whitlam's environmental statutes and, like Whitlam, proved prepared to use them to protect iconic locations from mining projects supported by the ultra-conservative, pro-development Queensland National Party Government of Sir Joh Bjelke-Petersen. Hence, Fraser brought a halt to sand-mining on Fraser Island (the world's largest sand island, which would later be World Heritage listed) using the *Environmental Protection (Impact of Proposals) Act 1975* (Cth) and the Commonwealth's power over exports. The validity of the legislation and Fraser's use of it was upheld by the High Court.[67]

Under Prime Minister Fraser, Australia ratified the *World Heritage Convention*. But in 1979 Tasmania's Hydro-Electric Commission (HEC) announced plans for its next major hydro-electric scheme to harness the power of rivers in the island State's south

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[65] See above n 57.
[66] upheld in *Port Macdonnell Professional Fisherman's Association Inc v South Australia* (1989) 168 CLR 340: see Hanks, above n 23, 181-2.
[67] *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1. See eg Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law* (Federation Press, 1993).

west wilderness. The Gordon below Franklin scheme would flood more of the Gordon River and also the completely wild Franklin River. Fraser was unwilling to intervene to override the Tasmanian Government of fellow Liberal, Premier Robin Gray.

2.4.4 1980s: PM Hawke's Government's World Heritage Cases

A national 'No Dams' campaign by conservationists contributed to the election of the Hawke Labor Government in 1983 which had promised to save the Franklin River. Hawke fulfilled his election pledge to prevent the HEC completing the Franklin Dam. This eventually led to the *Tasmanian Dam Case,*[68] a high water mark in Australian environmental law when the High Court delivered its historic judgment on 1 July 1983.[69]

During the 1980s the Hawke Government was far more receptive to conservationists' calls for federal intervention than had been Prime Minister Fraser, generating federal-State political and legal disputes at the highest level. Hawke later moved to expand what is now the Tasmanian Wilderness World Heritage Area (TWWHA) to protect areas in it from forestry. Towards the end of the 1980s, Hawke similarly moved to protect the iconic Daintree rainforest in North Queensland.

Conservative State governments in Tasmania and Queensland challenged Hawke on these three occasions the federal legislature's power to enact various statutes protecting these areas, arguing against perceived federal 'interference' in their residual 'States' rights'. Each time, the High Court of Australia ruled in favour of the

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[68] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'). See Geoff Law, *The River Runs Free: Exploring and Defending Tasmania's Wilderness* (Penguin Group, 2008) for a gripping account of environmentalists' campaign for the Franklin River, culminating in the historic High Court decision. Legal articles regarding the judgment are referenced in Chapter 5.
[69] Ibid.

Commonwealth (albeit narrowly 4-3 in the initial *Tasmanian Dam Case*).[70] The Court determined each time that the legislation in question was a valid exercise of the Commonwealth's external affairs power,[71] pursuant to Australia's obligations under the *World Heritage Convention* (and, in the *Tasmanian Dam Case*,[72] other federal heads of power such as the corporations power,[73] discussed at 2.3.3 above). Since valid federal law prevails over State law to the extent of any inconsistency,[74] these decisions confirmed the federal Parliament's power to implement Australia's international obligations, restraining where necessary development by State agencies such as Tasmania's Hydro-Electric Commission and Forestry Commission.[75]

The High Court's three World Heritage decisions of the 1980s upheld the Hawke Government's efforts to apply key constitutional foundations such as the external affairs power, thereby establishing federal mastery over the States in matters concerning the implementation of international environmental obligations.[76] The cases will be further considered in Chapter 5 which focuses specifically on World Heritage.

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[70] *Tasmanian Dam Case* (1983) 158 CLR 1; *Tasmanian Forests Case* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232 (*Wet Tropics Case*).
[71] *Australian Constitution* s 51(xxix).
[72] *Tasmanian Dam Case* (1983) 158 CLR 1.
[73] *Australian Constitution* s 51(xx).
[74] *Australian Constitution* s 109.
[75] See eg James Crawford, 'The Constitution and the Environment' (1991) 13 *Sydney Law Review* 11; Ben Boer, 'World Heritage Disputes in Australia' (1992) 7 *Journal of Environmental Law and Litigation* 247; Sir Garfield Barwick, 'The External Affairs Power of the Commonwealth and the Protection of World Heritage' (1995) 25 *Western Australian Law Review* 233; Richard Marlin, 'The External Affairs Power and Environmental Protection in Australia' (1996) 24 *Federal Law Review* 71.
[76] See discussion of the *Australian Constitution's* external affairs power in section 2.3.2 above. Other Commonwealth heads of power, such as the corporations (see section 2.3.3 above), exports, taxation and trade and commerce powers have also been important, but are largely outside the scope of this chapter. See further James Crawford, 'The Constitution and the Environment' (1991) 13 *Sydney Law Review* 11; Cheryl Saunders, 'The Constitutional Division of Powers with Respect to the Environment in Australia' in KM Holland, FL Morton and B Galligan (eds), *Federalism and the Environment: Environmental Policy Making in Australia, Canada and the United States* (1996); Senate Environment, Communications, Information Technology and the Arts References Committee, Parliament of Australia, *Commonwealth Environment Powers* (1999).

2.4.5 1990s: Rise of Co-operative Environmental Federalism

The High Court's confirmation of Commonwealth Constitutional power throughout the 1980s necessitated wider political recognition of the external affairs power's implications within Australia's federal system. This, combined with the end of Labor's period of government (under PM Hawke and Keating), then the domination of Australian politics by John Howard as PM from 1996-2007, saw the rise of co-operative environmental federalism.

2.4.5.1 1990: Special Premiers' Conference

This recognition formally commenced at a Special Premiers' Conference meeting on 31 October 1990. Australia's Heads of Government across the Commonwealth, States and Territories, and representatives of local government:

> agreed to develop and conclude an Intergovernmental Agreement on the Environment to provide a mechanism by which to facilitate:
>
> - a cooperative national approach to the environment;
> - a better definition of the roles of the respective governments;
> - a reduction in the number of disputes between the Commonwealth and the States and Territories on environment issues;
> - greater certainty of Government and business decision making; and
> - better environment protection.[77]

In foreshadowing a structural, staged retreat from the Commonwealth's robust approach of the 1980s, towards cooperative federalism, one could hope that improved environmental protection was listed last, but not least. However, its cause

[77] Commonwealth of Australia, *Intergovernmental Agreement on the Environment*, 1 May 1992 (a copy of which is set out in the *National Environment Protection Council Act 1994* (Cth) Schedule), Preamble.

would soon be boosted by the impending United Nations Conference on Environment and Development (UNCED) or Rio 'Earth Summit'.

2.4.5.2 1992: UNCED, the IGAE and NFPS

1992 was a dramatic year for environmental law, both internationally and within Australia's federation. Following the 1990 Heads of Agreement, the resulting *Intergovernmental Agreement on the Environment* ('IGAE')[78] was signed by the Heads of each tier of government (the Australian Prime Minister, the State Premiers, the two Territory Chief Ministers, and the Australian Local Government Association's President), on 1 May 1992.

The IGAE, a study in co-operative environmental federalism, was executed only:

- a week before the *United Nations Framework Convention on Climate Change*, opened for signature on 9 May 1992;[79] and
- a month before the *Convention on Biological Diversity*[80] opened for signature at the United Nations Conference on Environment and Development (UNCED or the 'Earth Summit') at Rio de Janeiro 3-14 June 1992.

UNCED also saw the adoption of various other environmental declarations and agreements[81] closer to 'soft law' than the above conventions. As the *Convention on*

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[78] Ibid.
[79] *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).
[80] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).
[81] See eg the:
Rio Declaration on Environment and Development, adopted June 14 1992, *Report of the United Nations Conference on Environment and Development* 3, Rio de Janeiro, June 3-14, 1992, UN Doc. A/Conf. 151/51 Rev 1, Vol I, United Nations Publication Sales No.E.93.I.8, New York (1993) reprinted in (1992) 31 I.L.M. 874, at 878, (the *Rio Declaration*);

Biological Diversity plus the *Apia Convention* and *World Heritage Convention* provide ample international environmental obligations for this thesis to prove its argument, it is not necessary to consider 'softer' international instruments here.

The IGAE's substantive provisions commence by setting out the 'responsibilities and interests of all levels of Government in relation to the environment'[82] to guide the Parties 'in determining the content of Schedules to this Agreement':[83]

The IGAE clause of primary importance to this thesis is cl 2.2.1(i), which reads:

> 2.2 RESPONSIBILITIES AND INTERESTS OF THE COMMONWEALTH
>
> 2.2.1 The *responsibilities* and interests of the Commonwealth in *safeguarding* and accommodating national environmental matters include:
>
> (i) matters of *foreign policy* relating to the environment *and*, in particular, negotiating and entering into international agreements relating to the environment and *ensuring* that *international obligations relating to the environment are met by Australia*
>
> (ii) …'[84]

The IGAE's statement that the Commonwealth's '*responsibilities* and interests … in *safeguarding* and accommodating national environmental matters include …

Agenda 21, Report of the United Nations Conference on Environment and Development 9, Rio de Jainero, June 3-14, 1992, UN Doc A/Conf.151/26/Rev.1, Volume I, United Nations Publication Sales No.E.93.I.8, New York (1993); and
the elaborately named *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Vol I, United Nations publication, Sales No E.93.I.8 and corrigendum), resolution 1, annex III.13 June 1992, UN Doc A/CONF 152/6/Rev.1, 31 ILM 881 (1992).

[82] IGAE, above n 77, cl 2.1.1.

[83] Ibid.

[84] Ibid cl 2.2.1 [emphasis added].

ensuring that international obligations relating to the environment are met by Australia'[85] is uncontroversial legally given:

- the *pacta sunt servanda* rule explained at 2.2.1 above; and
- the High Court finding for the Commonwealth in all three of its 1980s World Heritage judgments (2.4.4 above).

However, its acceptance by all Australian tiers of government formalised all the States' acknowledgment of Constitutional realities following the 1980s cases.

In return, the Commonwealth agreed to political limitations on its executive power to bind Australia to further international environmental treaties (thesis 2.3.1 above and IGAE 2.5.2.1 quoted below), as the IGAE records:[86]

> 2.3.3 The States have an interest in the development of Australia's position in relation to any proposed international agreements (either bilateral or multilateral) of environmental significance which may impact on the discharge of their responsibilities.
>
> ….
>
> 2.5.2 International Agreements
>
> 2.5.2.1 The parties recognise that the Commonwealth has responsibility for negotiating and entering into international agreements concerning the environment. The Commonwealth agrees to exercise that responsibility having regard to this Agreement and the Principles and Procedures for the Commonwealth-State Consultation on Treaties as agreed from time to time. In particular, the Commonwealth will consult with the States in accordance with the Principles and Procedures, prior to entering into any such international agreements.
>
> …. [specific procedures are set out]
>
> 2.5.2.4 When ratifying, or acceding to, approving or accepting any international agreement with environmental significance,

[85] Ibid.
[86] IGAE, above n 77.

> the Commonwealth will consider, on a case by case basis, making the standard Federal Statement on ratification, accession, approval or acceptance.

The IGAE's Schedules are to be interpreted in accordance with its Sections 1, 2 and 3[87] (the latter being Principles of Environmental Policy, eg, ecologically sustainable development), so it is unnecessary to also consider the Schedules in any detail. Two aspects of the IGAE Schedules need be noted here, however. Firstly, wherein:

> The parties agree to co-operate in fulfilling Australia's commitments under international nature conservation treaties and recognise the Commonwealth's responsibilities in ensuring that those commitments are met.[88]

This is now reflected in the wording of object EPBC Act object s 3(1)(e) examined at 2.5.6 below.

Secondly, of note here are IGAE Schedule 9 clauses which make specific reference to the role of measures for 'off reserve protection'.[89] These measures, it will be argued in Chapter 6, are an area in which the RFA regime (particularly as interpreted and applied by the Full Court of the Federal Court in the *Wielangta Case*)[90] fails to guarantee the protection widely agreed by scientists to be essential, and reflected as such in the *Apia Convention*. Thus, the IGAE laid the groundwork for the EPBC Act and is now reflected, for example, in the Act's:

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[87] Ibid Section 4.1 provides:
SECTION 4—IMPLEMENTATION AND APPLICATION OF PRINCIPLES
4.1 The Schedules to this Agreement deal with specific areas of environmental policy and management and form part of this Agreement. The schedules have been prepared and are to be interpreted in accordance with Sections 1, 2 and 3 of this Agreement.

[88] Commonwealth of Australia, *Intergovernmental Agreement on the Environment*, 1 May 1992 (a copy of which is set out in the *National Environment Protection Council Act 1994* (Cth) Schedule), Sch 9 cl 10,

[89] Ibid Sch 9 cl 8(ii) and cl 15.

[90] *Forestry Tasmania v Brown* (2007) 167 FCR 34.

- object regarding the protection of matters of national environmental significance[91] - though note criticism of the Act's limited list of MNES;[92]
- statement that it 'recognises an appropriate role for the Commonwealth in relation to the environment by focussing Commonwealth involvement on matters of national environmental significance';[93]
- object regarding ecologically sustainable development;[94] and
- 'principles of ecologically sustainable development';[95]

1992 also saw execution of the National Forest Policy Statement,[96] discussed in Chapter 3.

2.4.5.3 Co-operative Environmental Federalism in PM Keating's Forestry Policy

Prime Minister Paul Keating proved the greatest anomaly in the pattern of environmental behaviour by Labor Prime Ministers over this period. After eventually succeeding Prime Minister Hawke in 1991, he proved (as one might expect of a former Treasurer), most interested in continued economic reform. He took a personal interest in Aboriginal reconciliation (eg through native title and his famous 'Redfern speech'), but less interest in environmental protection. Accordingly, under Prime Minister Keating the Commonwealth's approach to the environment generally, and forestry policy in particular, shifted away from the interventionist Hawke

[91] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(a): see thesis 2.5.3
[92] See eg Environmental Defenders Office NSW and Doyle at thesis 2.5.1.2.
[93] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(a).
[94] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(b): see thesis 2.5.4.
[95] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A.
[96] Commonwealth of Australia, *National Forest Policy Statement*, 1992.

Governments of the 1980s (which had defeated both Tasmania and Queensland in the High Court) towards delegation to the States.

For example, during the period 1994-95, conservationists called on Commonwealth Minister for Resources, David Beddall, to use his annual issuing of woodchip export licences to protect forests, including areas on the Register of the National Estate.[97] Prime Minister Keating backed Minister Beddall in rejecting the advice of Environment Minister John Faulkner to exclude logging in 1311 sensitive forest coupes around the nation.[98] The economic and political considerations Hanks had foreshadowed[99] prevailed over environmental considerations in that there seemed:

- a mutual desire by State and federal governments of all persuasions to encourage economic development (or at least, that part of it comprising the forestry industry); and

- a strong Commonwealth desire to avoid antagonistic reactions from, and political fights with, State governments who were pushing for 'resource security'.

The EPBC Act would later (under PM Howard) abandon the regulatory power vested in the Commonwealth through 'indirect' environmental triggers such its control of woodchip export licences.[100] Shadow environment minster Duncan Kerr would later argue, unsuccessfully, for their return 'as a lever to ensure that there is a commitment to downstream industry processing.'[101]

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[97] Greg Buckman, *Tasmania's Wilderness Battles: A History* (Allen & Unwin, 2008), 112.
[98] Ibid.
[99] See Hanks, above n 23, 5.
[100] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 524 headed 'Things that are not *actions*', discussed below.
[101] Judith Ajani, *The Forest Wars* (Melbourne University Press, 2007), 229 quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 9 February 1999 (Duncan Kerr).

Similar considerations (such as 'settling' forestry disputes (thereby extracting the Commonwealth from their political risks), and promoting downstream industry processing of wood chips, eg through a Tasmanian pulp mill) saw the emergence of the RFA process. As explained in Chapter 3, it was initiated under the Keating Government.

2.4.5.4 Co-operative Environmental Federalism in PM Howard's EPBC Bill

After conservative Liberal John Howard defeated Keating in March 1996.[102] he followed through, with the RFA process, implementing RFA exceptionalism in the EPBC Act, then entrenching it in the RFA Act. Chapter 3 explains.

Co-operative federalism can also be discerned in the EPBC Act and its political precursor, the 1997 COAG Heads of Agreement which supplemented the 1992 IGAE. It is the subject of Chapter 3's section 3.2. Many conservationists viewed the Act as a retreat by the Commonwealth from its hard won constitutional power to regulate environmental issues more widely. For example, shortly after the Act commenced, Dr Timothy Doyle made clear his assessment of the Act's fundamental flaws. Doyle assessed PM John Howard's Governments (a Liberal-National Party Coalition, then less than halfway through Howard's rule to 2007 as Australia's second-longest serving Prime Minister) as 'the worst in relation to the environment since the birth of the modern [conservation] movement in the late 1960s.'[103]

Doyle asserted that fellow South Australian, 'Senator Robert Hill, a consummate professional politician and diplomat, was handed the environment portfolio to 'keep a lid' on environmental affairs, to remove the environment from its high ranking on

[102] Buckman, above n 97, 113.
[103] Timothy Doyle, *Green Power: The Environment Movement in Australia* (UNSW Press, revised ed, 2001), 12.

the national political agenda.'[104] While Doyle provides no direct evidence for this assertion, it is consistent with both the political considerations Hanks had foreshadowed[105] and attempts by both the Keating and Howard Governments to extract the Commonwealth, in so far as possible, from involvement in Commonwealth-State environmental disputes. This can be seen underlying the exercises in co-operative federalism which culminated in both the EPBC Act and (as discussed in the next chapter) the RFA Act.

Doyle also explains how negotiations over the EPBC Bill 'create[d] a rift between major green NGOs',[106] whereby the World Wide Fund for Nature (WWF), Humane Society International (HSI), Queensland Conservation Council (QCC) and Tasmanian Conservation Trust (TCT) supported the Bill, while the Australian Conservation Foundation (ACF) and The Wilderness Society (TWS) opposed it.[107]

Australia's political parties also divided across party lines. The Bill ultimately included around 500 amendments negotiated between Senator Hill and the Australian Democrats, which were 'tabled one day and passed the next, under a special Democrat-government agreement to curtail debate'.[108] These amendments strengthened the Act environmentally, but not enough for the Australian Labor Party and the Australian Greens who opposed it. However, with the Australian Democrats support the bill passed the Senate in July 1999, commencing a year later.[109]

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[104] Ibid.
[105] See Hanks, above n 23, 5.
[106] Ibid.
[107] Ibid.
[108] John Connor, 'ACF EPBC', *Habitat Australia* (1999) August, 9 in Doyle, above n 103, 12.
[109] The Australian Democrats disappeared from the Australian Parliament soon after, though this likely related far less to the party's role in passing the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) than to factors such as its leadership divisions, support for PM Howard's Goods and Services Tax (GST), and, arguably, the rise of the Australian Greens.

2.5 The EPBC Act

Since its enactment, the omnibus EPBC Act has been Australia's principal environment and heritage statute.[110] This section demonstrates the scheme through which the EPBC Act pursues its dual purposes, as set out below.

2.5.1 Purpose of the EPBC Act

As the Full Court of the Federal Court stated in *Minister for Environment and Heritage v Queensland Conservation Council Inc*:

> The EPBC Act was enacted to implement the provisions of the *Convention on Biological Diversity 1992*, and other international environmental agreements into Australian law. It also represents an attempt to consolidate and clarify the Commonwealth's responsibilities for environmental protection within the Australian Federation (see Second Reading Speech, House of Representatives, Hansard, 29 June 1999, at 7770). …[111]

Both of these key purposes are considered in turn below.

2.5.1.1 'implement the provisions of … international environmental agreements into Australian law'

The EPBC Act clearly, inter alia, 'provides the domestic legal framework for implementing Australia's obligations under a number of international conventions related to the environment'.[112] Firstly, as this chapter will show, the EPBC Act's

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[110] Department of the Environment, Water, Heritage and the Arts (Australian Government), 'Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*: Discussion Paper ' (Commonwealth of Australia, September 2008) <http://www.environment.gov.au/epbc/review/publications/discussion-paper.html>, i.

[111] (2004) 139 FCR 24, [2], quoted in *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34, [295] (Marshall J).

[112] Department of the Environment, above n 110 at <http://www.environment.gov.au/epbc/review/publications/pubs/02-objectives.pdf>. This report lists further 'key conventions of relevance to the *Environment Protection and Biodiversity Conservation*

provisions for environmental protection (and hence, EIA) focus on the Act's specified 'MNES' triggers. The vast majority of these matters relate to key environmental conventions, such as the *World Heritage Convention*,[113] the *Apia Convention*,[114] the *Convention on Biological Diversity*[115] and various other environmental treaties not relevant to forestry in Australia (nor, hence, directly to this thesis).

Secondly, EPBC Act object section 3(1)(e) refers to '… co-operative implementation of Australia's international environmental responsibilities'. Then s 3(2)(f) expressly cites World Heritage properties and Ramsar Convention wetlands, while s 3(2)(e) impliedly (by including language from them) refers to the *Apia Convention* and *Convention on Biological Diversity*.[116] The EPBC Act's subsequent machinery provisions contain multiple specific references to relevant MEAs and bilateral treaties (eg in relation to migratory birds).

Thirdly, and importantly, as will be seen at 2.5.7.6 below, in approving actions following a project or strategic assessment, including decisions as to attaching

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Act 1999 (Cth)': [2.16]. It also notes other conventions which are implemented through specific statutes, eg in respect of ozone protection and the management of hazardous wastes: [2.5].

[113] *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*'). In addition to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), some Australian World Heritage properties are also governed by other specific statutes: see, eg, the *Great Barrier Reef Marine Park Act 1975* (Cth), the *Wet Tropics of Queensland World Heritage Area Conservation Act 1994* (Cth) and the *Wet Tropics World Heritage Protection and Management Act 1993* (Qld).

[114] *Convention on Conservation of Nature in the South Pacific*, opened for signature 12 June 1976, [1990] ATS 41 (entered into force 26 June 1990).

[115] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

[116] The language from the Apia Convention and Convention on Biological Diversity used in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(e) will be explained in Chapter 6.

conditions of approval, 'the Minister must not act inconsistently with' Australia's obligations under specified conventions.[117]

The EPBC Act does not expressly state the constitutional heads of power under which it is enacted. As noted at 2.3.1 above, there is no constitutional requirement that an Act do so. However, as explained in section 2.3, the external affairs power supports Acts insofar as they implement international agreements. The Act also relies in some parts on support from other heads of power (as obvious in its National Heritage provisions, which are not internationally based).

Chapter 3 develops a research question based on Australia's international obligations in treaties the EPBC Act implements. Later chapters examine in more detail, through case studies, how the Act implements the *World Heritage Convention*[118] (Chapter 5) and the *Convention on Biological Diversity*[119] (Chapter 6).

The MEAs implemented by the EPBC Act which apply to the impacts of Australian forestry operations will be considered in the thesis' relevant case study chapters. As Hanks [120] foreshadowed, the federal government is cautious in exercising its environmental powers and so the EPBC Act is a creature of political, as well as legal, compromise. It will be argued in the case study chapters that, particularly given its narrow focus on protecting MNES, the Act should more fully incorporate in Australian law the conventions it purports to implement, so as to satisfy the Commonwealth's responsibilities to ensure fulfilment of Australia's international obligations.

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[117] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 137, 138, 139, 140 (projects), 146G, 146J, 146K, 146L (strategic assessments).
[118] opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).
[119] opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).
[120] Hanks, above n 23.

2.5.1.2 'consolidate and clarify the Commonwealth's responsibilities for environmental protection …'

The Howard Government promoted the Act as a rational consolidation of Australian environmental regulation, not only in the Second Reading Speech cited by the Full Court, but also in the Act itself.[121] It certainly replaced a suite of issue-specific statutes, many dating from the 1970s, within the consistent framework of one over-arching Act.

The Act also 'clarified' the 'Commonwealth's responsibilities for environmental protection', in particular by confining these to the Act's specified matters of 'national environmental significance' (MNES). Following years of political and legal disagreement (thesis 2.4), Commonwealth environmental responsibilities had been agreed by all three tiers of Australian government through the IGAE (thesis 2.4.5.2). Its agreed 'Commonwealth responsibilities' included, inter alia, fulfilment of the duty to implement Australia's international environmental treaty obligations, with which the States agreed to co-operate. Accordingly, most of the EPBC Act's MNES are based on environmental treaties. However, many other Commonwealth responsibilities agreed in the IGAE did not manifest as MNES in the Act, which was criticised on this basis as excluding EIA triggers ranging from climate change to forestry operations (see discussion of EPBC Act object s 3(1)(a) below at 2.5.3).

The EPBC Act abandoned previous indirect constitutional triggers, thereby narrowing the scope of Commonwealth legal involvement in environmental regulation. This confines the Commonwealth's regulatory interest to MNES, but arguably facilitates a deeper focus on them and, hence, on issues of international, concern. Given this, and the limited numbers of MNES, it is questionable whether the Act struck the optimum federal regulatory balance. Arguably, the Act is too timid

[121] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(a).

in its use of the Commonwealth's broad constitutional power (se eg section 2.3.3 regarding the corporations power).

As a consequence of its consolidation and clarification of responsibilities, the Act also claims a resultant reduction in duplication with State processes,[122] enhanced by provisions enabling bilateral agreements through which the Commonwealth can accredit State assessment, and potentially approval, processes. [123] The Commonwealth would claim this enables it to ratchet upwards and harmonize such State processes, rather than continued fragmentation (and potentially degenerating into a 'race to the bottom' lowest common denominator by some States seeking to attract project proponents).

Until now, the Australian Government has, in practice, limited its delegation through bilateral agreements to EIA, withholding to itself its ultimate approval power. The RFA experience of delegation to States, which this thesis will explore, will provide useful lessons as to the likely consequences of bilateral agreements delegating national approval powers over MNES to the States.

The promised reduction in red tape by minimising duplication, and the Act's tight deadlines for 'an efficient and timely Commonwealth environmental assessment and approval process', [124] was welcomed by business groups. However, the deadlines entirely work to provide the public with very limited time to comment on EPBC Act referrals, which can include long and complex specialised information.

2.5.2 EPBC Act Objects

The objects of the EPBC Act include, inter alia:

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[122] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(b).
[123] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(c).
[124] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(d).

> (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
>
> (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
>
> (c) to promote the conservation of biodiversity; and
>
> (ca) to provide for the protection and conservation of heritage; and
>
> (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
>
> (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and …[125]

The key objects of EPBC Act ss 3(1)(a), (b) and (e) are briefly analysed below to help background and explain the purpose(s) they express, an important function since statutory interpretation requires, inter alia, that:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.[126]

This purposive approach to statutory interpretation is considered in Chapter 6 in the context of the *Wielangta Case.*[127] The judgments in that case highlight the legal

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[125] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1).
[126] *Acts Interpretation Act 1902* (Cth) s 15AA.
[127] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34. Chapter 6 considers, in this context, discussion in Imran Church, '*Fauna v Forestry*: The Wielangta Forest Litigation' (2009) 28 *University of Tasmania Law Review* 125, 134-136. See more generally eg Jan Rohde, 'The Objects Clause in Environmental Legislation' (1995) 12 *Environmental and Planning Law Journal* 80.

meaning of 'provide for' and thereby, indirectly, shortcomings in EPBC Act ss 3(1)(a), (c). Accordingly, reviews of the EPBC Act have recommended reforms to those objects, which will be considered in the thesis' final chapter.

2.5.3 EPBC Act Object s 3(1)(a)

The matters of 'national environmental significance' (NES) to which object s 3(1)(a) refers are the Act's triggers for Commonwealth environmental approval, required of 'actions' which significantly 'impact' any of the 'matter protected'[128] by them. They consist of key environmental icons,[129] the subject of international conventions or otherwise subject to national jurisdiction under the Australian Constitution's external affairs power.[130] In this respect, they have replaced the other 'indirect' Constitutional triggers previously relied upon by the Commonwealth to require its environmental approval, such as the trade and commerce power, or Commonwealth funding.

None of the current MNES fall outside the 'responsibilities and interests of the Commonwealth' agreed in the IGAE [131] cl 2.2.1. But many have argued the Commonwealth should extend its environmental interests by adding to the list of current MNES. For example, Dr Timothy Doyle wrote in the wake of the EPBC Act's commencement:

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[128] Set out in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 34.
[129] The Act's 'matters of national environmental significance' include declared World Heritage properties, declared Ramsar wetlands, the Great Barrier Reef Marine Park, National Heritage places, nationally-listed threatened species and nationally-listed threatened communities, nationally-listed migratory species, nuclear actions and the Commonwealth marine area.
[130] *Commonwealth of Australia Constitution Act 1900* (Cth) s 51(xxix). In addition to international affairs, this head of power includes a geographic aspect, upheld in *NSW v Commonwealth* (1975) 135 CLR 337 (*Seas and Submerged Lands Act Case)*. This head of power thereby vests in the federal Parliament authority over Australia's marine jurisdiction, including the 'Commonwealth marine area' as defined in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 24.
[131] Commonwealth of Australia, *Intergovernmental Agreement on the Environment*, 1 May 1992 (a copy of which is set out in the *National Environment Protection Council Act 1994* (Cth) Schedule)

> On the whole the EPBC is an appalling piece of legislation. It effectively guts all the major environmental legislation developed over the past 20 years. Key flaws in the new system include:
>
> - a completely inadequate list of matter of [MNES] currently included as environmental impact assessment (EIA) triggers such as those relating to climate change, native vegetation, land degradation, water allocation and forestry operations;
> - the failure to retain Commonwealth funding as one of the new triggers; and
> - the failure to include a ministerial reserve power in relation to EIA triggers.[132]

These 'key flaws', which Doyle adapted from the EDO NSW,[133] remain unaddressed today, except for 'water allocation'. The suggestion that all forestry operations be an MNES trigger for EPBC Act EIA would be excessive and unworkable. However, RFA exceptionalism's exclusion from EPBC Act EIA of RFA forestry operations significantly impacting MNES goes too far to the other extreme, this thesis argues.

Repeal of RFA exceptionalism (the solution preferred by this author) would be not make all forestry operations subject to the EPBC Act. Rather, only forestry likely to significantly impact the 'matter protected' by a MNES would trigger the EPBC Act – as for all other industry sectors.

A water trigger was added to the EPBC Act under Prime Minister Gillard, which may prove useful in regulating hydraulic fracturing ('fracking') by the coal seam gas (CSG) industry. A trigger relating to climate change was contained in the Australian Labor Party's National Platform, passed at its 2007 National Conference, which promised, inter alia, that:

> Labor will introduce a climate change trigger in the Environment Protection and Biodiversity Conservation Act so that major new

[132] Doyle, above n 103, 12 (citation omitted).
[133] Environmental Defenders Office (NSW) (1999), 'EDO NSW Analysis of the Environment Protection and Biodiversity Conservation Act' in Doyle ibid.

> projects are assessed for their climate change impact as part of any environmental assessment process.[134]

Labor had even introduced a Bill for such a trigger when in Opposition,[135] but after the Rudd Labor Government's election in November 2007, did not act on its climate change trigger policy promise. It rejected the Hawke Report's recommendation for even an interim climate change trigger until Australia had a carbon pricing scheme in place. Consequently, to this day, while Australia has emissions reduction obligations under the *United Nations Framework Convention on Climate Change*[136] (eg from the *Kyoto Protocol* which the Rudd Government ratified), the Australian Government lacks a climate-related EPBC Act trigger enabling it to assess greenhouse impacts of new development projects likely to impact (eg cumulatively) on the nation's capacity to meet those obligations.

When the Government does progress the important issue of a climate change trigger, it should ensure that the EPBC Act's exemptions for RFA forestry operations do not apply to the climate change trigger in the same way that RFA forestry is exempted from the Act's other triggers (ie 'matters of national environmental significance').

2.5.4 EPBC Act Object s 3(1)(b)

Linked to the object of promoting ESD in s 3(1)(b), the Act s 3A defines five 'principles of ecologically sustainable development' (ESD).[137] These principles are:

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[134] Australian Labor Party, *National Platform and Constitution 2007* (2007) 137 <http://www.alp.org.au/download/2007_national_platform.pdf>.

[135] *Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005* (Cth). See also Commonwealth parliamentary debates re the *Environment and Heritage Legislation Amendment Act (No. 1) 2006* (Cth).

[136] *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

[137] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A provides:

> **Principles of ecologically sustainable development**
> The following principles are *principles of ecologically sustainable development*:
> (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

- integrated assessment;
- the precautionary principle;
- inter-generational equity;
- conservation of biodiversity and ecological integrity; and
- improved valuation, pricing and incentive mechanisms.[138]

The principles of ESD, *inter alia*, must be taken into account by the federal Environment Minister in deciding whether to approve an action under the EPBC Act.[139] This reflects the IGAE in which all Governments across Australia agreed that these same 'principles of ecologically sustainable development' (albeit subsequently refined slightly in the EPBC Act s 3A formulation) 'should inform policy making and program implementation.'[140]

2.5.5 The Precautionary Principle s 391

The precautionary principle is not only a principle of ESD in s 3A(b), but also the sole subject of s 391 which defines the principle and lists EPBC Act decisions in which it must be considered. One drafting peculiarity is that the precautionary

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(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
(c) the principle of inter-generational equity — that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
(e) improved valuation, pricing and incentive mechanisms should be promoted.

[138] Ibid. Guidance as to the content of 'improved valuation, pricing and incentive mechanisms' can be found in the IGAE, cl 3.5.4 which lists four examples. Importantly, the mechanisms listed including the 'polluter pays' principle, which the IGAE defines as 'those who generate pollution and waste should bear the cost of containment, avoidance or abatement.' This principle has application to many forms of pollution, potentially including emissions of greenhouse gases. It, and other of the principles listed in the IGAE, would be consistent with carbon pricing through market mechanisms.

[139] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136(2).

[140] Commonwealth of Australia, *Intergovernmental Agreement on the Environment*, 1 May 1992 (a copy of which is set out in the *National Environment Protection Council Act 1994* (Cth) Schedule) s 3.5 and see ss 3.1-3.5.4.

principle is defined in slightly different terms in EPBC Act s 3A(b) and s 391. Professor Fisher (a particular expert in statutory construction) suggests that the difference in terminology between the formulations of the precautionary principle in s 3A(b) and s 391 is probably insufficient 'to make much difference in practice'.[141] To the extent that there may be any practical difference, EPBC Act ss 136(2) and 391 currently require both precautionary principle formulations to be considered by the federal Environment Minister in deciding whether to approve an action under the EPBC Act. This adds an extra degree of (possibly redundant) environmental protection. If that is not Parliament's intent, then when the EPBC Act is next amended these precautionary principle formulations should be made consistent.

2.5.6 EPBC Act Object s 3(1)(e)

The wording of object s 3(1)(e) reflects the first half of IGAE[142] Sch 9 cl 10, by which 'The parties agree to co-operate in fulfilling Australia's commitments under international nature conservation treaties and recognise the Commonwealth's responsibilities in ensuring that those commitments are met.' 'Co-operative federalism' is thereby extended to the States, Territories and local government:

- agreeing to assist in 'fulfilling' Australia's obligations under international nature conservation treaties; and
- acknowledging the Commonwealth's duties in 'ensuring' those obligations are met.

Achieving this agreement across all governments within Australia in May 1992 was a huge step forward from Tasmania and Queensland's unsuccessful World Heritage challenges in High Court during the 1980s, the latest defeated by the Commonwealth

[141] See also: Douglas E Fisher, *Australian Environmental Law* (Lawbook, 2003), 293.
[142] Commonwealth of Australia, *Intergovernmental Agreement on the Environment*, 1 May 1992 (a copy of which is set out in the *National Environment Protection Council Act 1994* (Cth) Schedule).

in 1989.[143] Those decisions arguably left the States with little choice but to 'recognise the Commonwealth's responsibilities', although 'ensuring' is a powerful word. But agreeing 'to co-operate in fulfilling Australia's commitments' went beyond what was legally required of the States, and was certainly a far cry from challenging or obstructing the Commonwealth as in the 1980s.

However, actions speak louder than words, and the fine words of IGAE[144] Sch 9 cl 10 has not been matched in reality. While intergovernmental co-operation underlies the schemes of both the EPBC Act and RFA Act, much of the co-operation in the RFA context has not assisted 'in fulfilling Australia's commitments under international nature conservation treaties'.[145] Nor has the Commonwealth lived up to its agreed 'responsibilities in ensuring that those commitments are met.'[146] Indeed, as will be seen in Chapter 6, in the *Wielangta Case*[147] the Australian and Tasmanian governments co-operated in a way that, it will be argued, so emasculated purported RFA protection of threatened species as to breach Australia's obligations under the *Apia Convention*[148] and *Convention on Biological Diversity*.[149] The Governments' actions thereby:

- spoke louder than (and directly contradicted) their words in both halves of IGAE[150] Sch 9 cl 10; and

- ran counter to EPBC Act object s 3(1)(e).

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[143] *Queensland v Commonwealth* (1989) 167 CLR 232 ('*Wet Tropics Case*').
[144] Commonwealth of Australia, *Intergovernmental Agreement on the Environment*, 1 May 1992 (a copy of which is set out in the *National Environment Protection Council Act 1994* (Cth) Schedule)
[145] Ibid s 3.5.
[146] Ibid.
[147] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34
[148] *Convention on Conservation of Nature in the South Pacific*, opened for signature 12 June 1976, [1990] ATS 41 (entered into force 26 June 1990).
[149] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993)
[150] Commonwealth of Australia, *Intergovernmental Agreement on the Environment*, 1 May 1992 (a copy of which is set out in the *National Environment Protection Council Act 1994* (Cth) Schedule)

2.5.7 EPBC Act Scheme

An action likely to significantly impact on a matter of NES (which the Act calls a 'controlled action'),[151] is *prima facie* prohibited[152] and constitutes an offence under the relevant provision of Pt 3. In general, 'A person proposing to take an action which the person thinks may be or is a controlled action must [first] refer the proposal to the [Australian Government's Environment] Minister for the Minister's decision [as to] whether or not the action is a controlled action.'[153] The Act's main incentive for referral lies in the offences summarised below.

2.5.7.1 Prohibited Actions Relating to MNES

The EPBC Act Pt 3 provides offences, the scheme of which is common to each of the MNES relevant to this thesis. A person must not:

- take an 'action'[154] that has, will have or is likely to have
- a *significant* 'impact'[155] on
- the 'matter protected'[156] of
- a matter of National Environmental Significance [157]
- without lawful authority.[158]

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[151] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 67.
[152] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 67A.
[153] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68(1).
[154] 'action' is defined in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss523-524A.
[155] 'impact' is defined in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 527E.
[156] 'matter protected' is defined in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 34 for each MNES, eg the:
- 'world heritage values' of a declared World Heritage property;
- National Heritage values of a National Heritage place;
- 'ecological character' of a Ramsar listed wetland; etc.

[157] See thesis 2.5.3 *EPBC Act Object s 3(1)(a*).
[158] See 2.5.7.4 *Defences*.

For example, s 12(1) prohibits an action likely to significantly impact the world heritage values of a declared World Heritage property, without lawful excuse. Equivalent provisions protect from significant impacts without lawful authority the 'matter protected' aspect of other MNES.[159]

Maximum *civil* penalties for breaches of s 12(1) and its equivalent provisions are some $550,000 for individuals and $5,500,000 for corporations.

2.5.7.2 Offences Relating to MNES

Furthermore, the EPBC Act makes it a *criminal offence* for a person to take an action that results in, or will result in,[160] or is likely to have,[161] a significant impact on the protected MNES without lawful authority. For example, maximum criminal penalties for individuals committing the s 15A World Heritage offence extend beyond a fine to include imprisonment for up to seven years.

2.5.7.3 'Significant' Impact on MNES

The EPBC Act Pt 3 offences, and hence EPBC Act Pt 7 assessment requirements, are triggered not by any impact, but only by an action which has, will have, or is likely to have a 'significant impact'[162] on a matter of MNES. The Australian Government has issued administrative guidelines to 'provide overarching guidance on determining whether an action is likely to have a significant impact on a MNES.'[163] These guidelines define a 'significant impact' as:

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[159] eg *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 18A *prima facie* prohibits an action likely to significantly impact a nationally-listed threatened species or ecological community.
[160] See eg *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s15A(1).
[161] See eg *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s15A(2).
[162] Ibid.
[163] Department of the Environment, Water, Heritage and the Arts, Significant Impact Guidelines 1.1: Matters of National Environmental Significance, (2009) <http://www.environment.gov.au/epbc/publications/nes-guidelines.html>.

> an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts. You should consider all of these factors when determining whether an action is likely to have a significant impact on matters of national environmental significance.[164]

This definition, in its first sentence, adopts the test of significance applied by Branson J in *Booth v Bosworth*[165] and accepted in subsequent EPBC Act cases.[166] The administrative guidelines' criteria specific to each matter of NES are worded in a manner which suggests that in most cases where, for the purposes of this thesis, forestry operations impact on a matter of NES, the impact would likely to be such as to meet the guidelines' criteria for 'significance'.[167]

2.5.7.4 Defences

There are certain circumstances in which a person may lawfully take an action that has, will have, or is likely to have, a significant impact on a matter of NES, despite EPBC Act ss 12(1), 15A and their equivalent provisions for other MNES. These circumstances include:

- Where the person has obtained approval from the Commonwealth Environment Minister for the taking of the action.[168]
- Where the Minister has decided that the action is not a 'controlled action' for the purposes of this section (and hence does not require approval).[169]

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[164] Ibid
[165] [2001] FCA 1453 [99] (*Flying Fox Case)* discussed by Chris McGrath, 'The Flying Fox Case' (2001) 18 *Environmental and Planning Law Journal* 540, 548, 549-554.
[166] See eg *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24.
[167] Department of the Environment, Water, Heritage and the Arts, above n 163.
[168] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(a), 15A(4)(a).
[169] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(c), 15A(4)(c).

- Where a bilateral agreement,[170] ministerial declaration, accredited management arrangement or authorisation process[171] provides that the action does not require approval.
- Where the person undertakes an RFA forestry operation in accordance with an RFA.[172]
- Pre-existing uses.[173]
- Where the action is an action described in s 160(2) (foreign aid or aviation operations subject to a special approval process).[174]

The Great Barrier Reef Marine Park (and hence industries such as tourism and fishing operating within it) formerly enjoyed an EPBC Act exemption (being regulated instead under the *Great Barrier Reef Marine Park 1975* (Cth)).[175] However, this exemption has now been removed from the EPBC Act.[176]

Generally, the above defences apply to actions that have been subject to some form of approval process.

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[170] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b), 29-31.
[171] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b), 32-37M.
[172] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b), 38-42. 'RFA forestry operations' and 'regional forest agreement' have the same meaning as in the *Regional Forest Agreements Act 2002* (Cth): *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38(2).
[173] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b), 43A-43B.
[174] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(d), 15A(4)(d).
[175] See eg Baxter, above n 62.
[176] See *Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008*; Department of the Environment, Water, Heritage and the Arts, 2008 'Amendments to the *Great Barrier Reef Marine Park Act 1975*: An overview' <http://www.environment.gov.au/coasts/gbr//publications/gbrmp-act-amendment.html>.

2.5.7.5 Where the Action Triggers EIA under the EPBC Act

An action is a 'controlled action' requiring EPBC Act approval if it would otherwise be prohibited by Part 3;[177] i.e. actions that have, will have, or are likely to have, a significant impact on the 'matter protected' for a MNES, as described above.

Where a person proposes to take an action that they believe does or may need approval, they must first refer the proposal to the Minister for a decision on whether an approval is required.[178] For example, if a person proposes to take an action that is likely to have a significant impact on the world heritage values of a declared World Heritage property, they must refer the action to the Minister.[179]

If the person or government agency proposing to take an action believes the action will not require approval, they can still refer the proposal to the Minister for a determination on whether or not approval is required.[180] A referral of a proposed action by another party can be made by a State or Territory[181] or government agency[182] with administrative responsibilities relating to the action. The Minister may also, of her or his own initiative, request a referral.[183]

The Minister's decision as to whether the proposed action is a 'controlled action' is governed by the Act Pt 7. If the Minister decides the action is not a 'controlled action', then the action may lawfully be taken without assessment or approval. If the Minister decides the action is a 'controlled action', s/he must then choose one of a range of environmental assessment methods available under the EPBC Act, in order to enable her/him to then make an informed decision as to whether or not to approve

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[177] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 67.
[178] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68(1).
[179] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 67A.
[180] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68(2).
[181] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 69.
[182] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 71.
[183] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 70.

the action under Pt 9 approval requirements.[184] That assessment can be conducted under a State process pursuant to a bilateral agreement under the EPBC Act between with the State and the Commonwealth. A prominent example of such a process is considered in the Chapter 7 case study of Gunns Limited's pulp mill proposal.

2.5.7.6 Approvals Must Not Breach Convention Obligations

In deciding whether or not to approve the taking of an action, and what conditions to attach to such an approval (the approval decision), the Minister must follow various requirements.[185] Importantly, these requirements include the safeguard that 'the Minister must not act inconsistently with' Australia's obligations under specified multilateral or bilateral environmental conventions, relevantly (for the purposes of this thesis concerned with Australian forestry) including:

- the *World Heritage Convention*;[186] or
- the *Convention on Biological Diversity*;[187] or
- the *Apia Convention*.[188]

A Ministerial approval in contravention of this prohibition would be unlawful. Given:

- the analogous wording of the provision ('the Minister must not act inconsistently with …') to that applied by the High Court in *Project Blue Sky v Australian Broadcasting Authority*;[189] and
- the objectively ascertainable legal content of Australia's obligations under the specified conventions,

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[184] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 66.
[185] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 136-140A.
[186] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 137(a).
[187] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 139(1)(a)(i).
[188] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 139(1)(a)(ii).
[189] (1998) 195 CLR 355.

such an unlawful approval could be challenged by a third party under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) using the EPBC Act's extended standing provisions.[190]

Nevertheless, in practice, when Ministerial statements of reasons for approval decisions are requested and furnished, they generally simply state, with little further explanation, that the Minister considered Australia's obligations under the relevant international convention(s) and concluded that the decision would accord with them.[191] This 'tick a box' approach to statements of reasons demonstrates no evidence of real engagement with international obligations, and may leave some approvals vulnerable to legal challenge.

Hence (leaving aside procedural difficulties in successfully challenging such Ministerial decisions through judicial review), the EPBC Act requirement that approval decision-making complies with Australia's relevant treaty obligations is a potentially important limitation on approvals.

2.6 Conclusion

This chapter charted the over-arching treaty law, constitutional law and political considerations which led to the EPBC Act, as well as analysing key components of the Act itself. This conclusion summarises these and draws out the emerging theme of co-operative environmental federalism.

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[190] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 487, 488.

[191] See eg Malcolm Turnbull, Minister for the Environment and Water Resources, Statement of Reasons for Decision to Approve the Proposed Action by Gunns Limited to Construct and Operate a Pulp Mill at Bell Bay, Tasmania and Associated Infrastructure (EPBC 2007/3385), 1 November 2007, 28 [91] stating:

> I also took account of Australia's obligations under international conventions and agreements. I concluded that my decision would not be inconsistent with Australia's obligations under the Biodiversity Convention, the Apia Convention, CITES, the Bonn Convention, CAMBA or JAMBA.

2.6.1 Treaty Implementation: International Duty and Constitutional Capacity

The Commonwealth has both the international duty and constitutional power to implement treaty obligations in domestic law. Section 2.2 set out the fundamental rule of treaty law, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'[192] Other articles of the *Vienna Convention on the Law of Treaties* leave no wriggle room for Australia to avoid this duty on account of its federation. Neither does Australian constitutional law, under which the external affairs power and other heads of power (eg, the corporations power) enable the Commonwealth to implement its treaty obligations (section 2.3 above). PM Hawke's use of these powers to implement the *World Heritage Convention* was upheld by the High Court in all three 1980s cases.[193] Since then, interpretation of the corporations power, in particular, has expanded greatly. This confirms the national Parliament has much more capacity for environmental regulation than it has ever chosen to exercise.[194] Hence, today, 'the key issue is not so much whether the Commonwealth has the power to make environmental laws but when and how it should do so.'[195]

This 'key issue' is circumscribed less by legal, than by political considerations. The challenge is to overcome these political considerations to produce a federal regulatory and administrative framework driven by best practice policy and principles. Section 2.4 suggested such high-minded aspirations drive Australia's

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[192] The *pacta sunt servanda* rule as codified in the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 26.
[193] *Tasmanian Dam Case* (1983) 158 CLR 1; *Tasmanian Forests Case* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232 (*Wet Tropics Case*).
[194] Department of the Environment, above n 110, [2.6]-[2.7].
[195] Ibid [2.7]. A decade earlier, two months before passage of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), a Senate Committee report recommended that 'The Commonwealth should not hesitate to creatively employ the wide powers it possesses in order to protect and conserve the environment and should vigorously defend its power when challenged': Senate Environment, Communications, Information Technology and the Arts References Committee, Parliament of Australia, *Commonwealth Environment Powers* (1999), 10.

environmental legislation far less than political ideology which waxes and wanes as governments change. 1992 was a particularly high achieving year for environmental law at Rio and in Australia with the IGAE and NFPS. Since then, Australia has been dominated by co-operative environmental federalism, embodied in the EPBC Act.

2.6.2 EPBC Act: Consolidation and Treaty Implementation

The Full Court of the Federal Court has noted that, 'The EPBC Act was enacted to implement the provisions of the *Convention on Biological Diversity*, and other [MEAs] into Australian law…' and to consolidate federal environmental responsibilities.[196] Section 2.5.1 explained how the Act achieves both these purposes. The Whitlam Government enacted a suite of federal environmental legislation. That challenged was upheld by the High Court as constitutional in contexts regarding:

- the geographic element of the external affairs power;[197] and
- Commonwealth Government capacity to use its export control power to refuse export licences for environmental reasons.[198]

The omnibus EPBC Act replaced most federal environmental statutes focused on specific issues (eg World Heritage,[199] endangered species[200] or EIA[201]). In this respect, the Act was rightly heralded in its Second Reading Speech as an overdue *consolidation* of disparate national environmental statutes under one roof.[202]

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[196] *Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24, [2], quoted in *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34, [295] (Marshall J): full quote set out at 2.5.1.
[197] *NSW v Commonwealth* (1975) 135 CLR 337(S*eas and Submerged Lands Act Case*).
[198] *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1.
[199] *World Heritage Properties Conservation Act 1983* (Cth).
[200] *Endangered Species Protection Act 1992* (Cth).
[201] *Environmental Protection (Impact of Proposals) Act 1974* (Cth).
[202] Commonwealth, *Parliamentary Debates*, Senate, 29 June 1999, (Sharman Stone, Parliamentary Secretary to the Minister for the Environment and Heritage).

The Act aims, inter alia, 'to assist in the co-operative implementation of Australia's international environmental responsibilities'[203] through protection it provides MNES, most the subject of treaties. Relevant to this thesis are various MEAs which the Australian Government has signed and ratified.[204] Australia's Parliament[205] has then implemented these treaties' specific obligations in the EPBC Act. This thesis explores the extent to which those treaty obligations are implemented with respect to environmental impacts of forestry operations, given RFA exceptionalism.

2.6.3 Federal Responsibility for International Obligations

Intergovernmental agreements between the federal government and all States and Territories [206] have acknowledged the Commonwealth's responsibility to ensure fulfilment of Australia's international environmental obligations. This is a logical division of treaty responsibility within the Australian federation given the federal government's executive power to sign and ratify treaties and the Australian Parliament's power to implement them. This does not necessarily absolve States or others of responsibility to avoid actions which jeopardise Australia's international obligations. Ultimately, however, it is the Commonwealth's responsibility to ensure this does not occur. The Commonwealth cannot absolve itself of this responsibility by EPBC Act object s 3(1)(e) referring to 'the co-operative implementation of Australia's international environmental responsibilities'. Hopefully, States and others will co-operation in this endeavour, but in case they do not, the Commonwealth must retain capacity to ensure compliance.

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[203] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(e).
[204] pursuant to its Executive power: *Australian Constitution* s 61.
[205] pursuant to its external affairs power: *Australian Constitution* s 51.
[206] See eg the "Commonwealth responsibilities" in the IGAE (see Chapter 2) and Council of Australian Governments (COAG), 'Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment', November 1997 <http://www.environment.gov.au/epbc/publications/coag-agreement/>; see also Department of Agriculture, *The RFA Process* Australian Government <http://www.daff.gov.au/rfa/about/process/introduction>.

The onus on the Commonwealth to ensure Australia meets its international obligations requires federal leadership and the retention of sufficient legal power (including enforcement mechanisms) to encourage and, when necessary, compel compliance by States and those they ordinarily regulate. Given a federal Government may be unwilling (eg for political reasons) to enforce Australia's domestic (let alone international) environmental law, federal law should also allow third party law enforcement within Australia to ensure those obligations are met. The EPBC Act provides for such civil enforcement by third parties, including injunctions. However, in general, this is restricted to judicial review, rather than merits review. Most Australian States allow both judicial and merits review of planning decisions.

2.6.4 EPBC Act Co-operative Environmental Federalism and Bilateral Agreements

The EPBC Act is a creature of co-operative environmental federalism, exemplified in:

- its development during the 1990s (eg, the IGAE (1992) and subsequent, less-protective, COAG Heads of Agreement (1997):[207] see sections 2.4.5 and 3.2);
- its objects (see sections 2.5.2 - 2.5.6); and
- its provisions for bilateral agreements with the States.

Co-operation is generally a virtue, though it depends to what end. Prima facie, the IGAE and the EPBC Act employ co-operative federalism for positive environmental purposes, such as co-operatively implementing Australia's international environmental obligations.[208] The Act also provides for a co-operative *mechanism*,

[207] Council of Australian Governments (COAG), 'Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment', November 1997 <http://www.environment.gov.au/epbc/publications/coag-agreement/> – see section 3.2 in Chapter 3.
[208] See eg *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(e).

bilateral agreements, which enable the Australian Government to delegate to the States its EIA and/or project approvals powers. Their aim is to 'strengthen intergovernmental co-operation, and minimise duplication, through bilateral agreements'.[209] However, the Act having narrowed the Commonwealth's regulatory role to MNES, devolution of its approval decisions to States risks removing from the Commonwealth its remaining environmental oversight power. This could come at the expense of the other substantive outcomes (beyond co-operation), such as environmental protection and meeting international obligations, which the Act's objects seek. Contemporary developments in relation to EPBC Act bilateral agreements, and their comparison with RFAs, are considered in Chapter 8 at 8.10.1.

[209] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(b).

Chapter 3 Regional Forest Agreement (RFA) Exceptionalism

3.1 Introduction

This chapter analyses *how* and the official reasons *why* the Australian Parliament excluded environmental impacts of RFA forestry from regulation by the EPBC Act. Enactment of this exclusionary scheme (which this thesis describes as 'RFA exceptionalism'), and the justifications for it, are the chapter's key foci. Forestry is instead regulated under a specific national statute, the RFA Act, which governs RFAs. These ten intergovernmental agreements, each between the Australian Government and one of the Australian States (New South Wales, Victoria, Western Australia and Tasmania), cover commercial forestry in RFA regions.[1]. The RFAs, generally of 20 year duration, mostly predated the RFA Act but are entrenched by it.

Specifically, the chapter:

- summarises intergovernmental background to RFA exceptionalism in the COAG Heads of Agreement (section 3.2 of the chapter);
- explains the method of its statutory implementation, through
    - the EPBC Act (section 3.3); and
    - the RFA Act (sections 3.6-3.11), especially RFA Act s 6 (considered in section 3.8.7); and
- analyses and critiques the justifications given for it, both:
    - justifications in the EPBC Act (sections 3.3); and;
    - the contemporary governmental justification (section 3.4).

[1] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 41.

While the EPBC Act includes standard planning law exemptions such as for existing uses (generally applicable at the individual firm level), forestry is the one industry sector to which the EPBC Act grants a blanket exclusion from its Part 3 environmental protections, and thereby also its Part 7 EIA and Part 9 approval processes.[2] The chapter's section 3.3 argues that a number of the reasons set out in the EPBC Act for RFA exceptionalism are outdated and no longer applicable due to statutory amendments (eg those summarised in RFA Act s 6). For example, export licences have been rendered redundant as mechanism for environmental regulation by the EPBC Act[3] and RFA wood specifically exempted from export control laws.[4]

Accordingly, the chapter turns in section 3.4 to the contemporary justification for RFA exceptionalism given by Australia's national and State Governments (and the forestry industry): their claim that RFAs provide equivalent protection to the EPBC Act. From this justification, section 3.5 develops the research questions and hypotheses which the thesis will test.

Subsequent sections of this chapter, from 3.6, commence hypothesis testing by critiquing the RFA Act. It is shown to be far less protective of the environment than the EPBC Act, the RFA Act being focused more on protecting States and their forestry industries from future federal intervention.

3.1.1 RFA Exemption Provisions of the EPBC Act

The chapter analyses the statutory provisions of both the EPBC Act and RFA Act which enact RFA exceptionalism. It identifies three such operative sections of the EPBC Act (ss 40, 38 and 75(2B)). These provisions are collectively referred to at various times in the thesis as 'RFA exemptions' (from the EPBC Act). These EPBC

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[2] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38(1); *Regional Forest Agreements Act 2002* (Cth) s 6(4).
[3] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 524 definition of 'action': see thesis section 3.3.2.1-3.3.2.2.
[4] *Regional Forest Agreements Act 2002* (Cth) ss 6(1), (2): see thesis section 3.8.7.1.

Act sections exclude or restrict operation of the Act in three different contexts, respectively:

1. Section 40: Forestry operations in an RFA region *without* an RFA in force[5] (eg SE Queensland).[6]

2. Section 38: RFA forestry operations in an RFA region where an RFA *is* in force (the operations need to be 'undertaken in accordance with' the RFA).[7]

3. Subsection 75(2B): Prohibits the Minister considering adverse impacts of RFA forestry operations in deciding whether a referred action (eg a downstream processing project) is a 'controlled action' requiring assessment and approval under the EPBC Act.[8]

EPBC Act s 75(2B) is the specific focus of Chapter 7. The section commenced in February 2007, just in time to be applied to Gunns Limited's Tamar Valley pulp mill proposal. The company withdrew from an EPBC Act accredited assessment of its pulp mill proposal in March 2007, then resubmitted that same proposal for assessment under the EPBC Act (now including s 75(2B), upon which the federal Minister later relied in the Federal Court).

Below is a summary of how EPBC Act ss 40 and 38 are considered in this chapter. Section 38 is also an underlying theme running through Chapter 5 onwards.

3.1.2 RFA Exceptionalism Justifications and Methodology

This chapter, inter alia, analyses s 40, including extensive analysis of justifications for s 40 contained in EPBC Act s 39. These justifications are shown to be outdated and/or unconvincing rationalisations. Even the s 40 heading suggests it is a relic of

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[5] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40.
[6] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 41(1)(h).
[7] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38; *Regional Forest Agreements Act 2002* (Cth) s 6(4).
[8] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2B), the focus of Chapter 7.

the time the EPBC Act was enacted, when some RFAs were still under negotiation. Thus, repeal of s 40 is recommended.

Section 38 applies across remaining (most) RFA regions, being the most widely applicable of the three RFA exemptions. Its contemporary governmental justification is therefore examined, and forms the basis for the thesis' research question. In a key report for domestic and international forestry reporting, *Australia's State of the Forests Report 2008* [the SOFR],[9] Australia's national and State governments made two key claims justifying RFA exceptionalism. Firstly, after noting that the EPBC Act 'applies to matters of national environmental significance', the SOFR asserted:

> The comprehensive assessments undertaken as part of the RFA process mean that *RFAs are regarded as providing an equivalent level of protection to that provided by the EPBC Act*. *Therefore forestry operations undertaken in RFA areas do not require approval under the Act.*[10]

The *latter* (emphasis added) part of the SOFR statement was echoed by Australia's peak forest industry group in its 2008 submissions to a Senate Committee investigating the EPBC Act[11] and the 10-year statutory review of the Act.[12] The NAFI argued that forestry operations are undertaken in accordance with RFAs and would be EPBC Act compliant. Accordingly, applying the EPBC Act to such operations would be needless duplication without meaningful environmental gain.

Testing this key justification for RFA exceptionalism shapes this thesis' Research Question 1 in the chapter's Methodology section 3.5. Research Question 2 tests Australia's compliance with its duty to fulfil its treaty obligations.

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[9] Montreal Process Implementation Group for Australia, 'Australia's State of the Forests Report 2008' (Bureau of Rural Sciences, 2008) <http://adl.brs.gov.au/forestsaustralia/publications/sofr2008.html> [SOFR].
[10] Ibid 186 (emphasis added).
[11] National Association of Forest Industries (NAFI), Submission No 56 to Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, Inquiry into the Operation of the *Environment Protection and Biodiversity Conservation Act 1999*, September 2008.
[12] National Association of Forest Industries (NAFI), Submission No 133 to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*, December 2008, 3 (emphasis added), citing 'Australia's State of the Forests Report 2008' above n 9.

The SOFR also stated, '… The protection provided by Australia's RFAs is given legal status through the *Regional Forest Agreements Act 2002* (Cwlth).'[13]

3.1.3 RFA Act

Given the above, and to start testing for EPBC Act equivalence, the chapter therefore examines the RFA Act, from thesis section 3.7. However, it finds this SOFR claim questionable on the face of the RFA Act: the legal status given by the RFA Act to RFAs does little for environmental protection. Rather, the RFA Act is far more focused on protecting RFA States and their forestry industries from a future national government minded to restrict forestry (eg for environmental protection purposes).

To this end, the RFA Act seeks to 'future-proof' (or ensure 'durability' for) RFAs by dissuading successor Australian Governments from pursuing future environmental protection of forests without State agreement. It does so by mandating that if the Australian Government does so (eg expands forest reserves), it must pay industry compensation. In contrast, the RFA Act does not endeavour to make RFA provisions binding on States. The chapter's RFA Act analysis demonstrates the RFA Act to be a statute aimed at protecting States' 'rights' to manage their forest resources so as to provide industry with resource security.

As such, it is far from clear how the RFA regime provides equivalent environmental protection to the EPBC Act, as claimed by Australia's federal and all State governments, and by industry. Accordingly, this SOFR claim is worth testing as this thesis does through its research question and later chapters.

3.1.4 EPBC Act - RFA Act Comparison

Chapter 2 covered key aspects of the EPBC Act relevant to this thesis. It explained, inter alia, how the Act consolidated Australian environmental law from a wide range of 'indirect' Constitutional triggers for national regulation, to the Act's limited

[13] Montreal Process Implementation Group for Australia, above n 9, xvi-xvii.

'matters of national environmental significance' (MNES). Most of the latter are subject to treaty obligations specified in the Act,[14] empowering the Commonwealth to implement them pursuant to its external affairs power.[15]

Compared to the various statutes it replaced, the EPBC Act substantially *narrowed* the range or scope of issues potentially *triggering* Commonwealth environmental involvement. However (as something of a *quid pro quo*), the Act was promoted as *deepening* the degree of protection for MNES. The EPBC Act did strengthen MNES protection by, for example:

- making the promotion of their protection its first-listed object;[16]
- *increasing penalties* for significantly impacting them without permission;[17]
- assigning that approval decision[18] (and responsibility for administering the Act) to the Australian *Environment* Minister (whereas previously s/he could be limited to advising another 'action' Minister, who could reject the Environment Minister's advice);[19] and
- easing restrictions to its enforcement by third parties (eg more open standing),[20] so as to facilitate civil society (eg ENGOs) acting as surrogate regulators.

By contrast, this chapter finds the RFA Act:

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[14] National heritage is a notable exception, it being reliant not on the Commonwealth's external affairs power, but rather, on indirect Constitutional triggers.
[15] *Australian Constitution* s 51(xxix).
[16] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(a).
[17] To be precise, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) requires EIA and the Australian Environment Minister's approval of an action likely to significantly impact on 'matter protected' by the Act (eg World Heritage values) for a MNES (eg a declared World Heritage property). The matter protected for each MNES, and sections imposing penalties for breach, are listed in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 34.
[18] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Pt 9.
[19] See thesis section 3.3.2.1 in the context of wood chip export licences.
[20] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 475-480.

- objects (and the Act itself) focused on protecting industry over the environment (see at 3.7 and particularly 3.7.4);
- completely lacking financial penalty provisions;
- removing approval environmental and other approval requirements from federal Ministers;[21] and
- thereby also removing access to EPBC Act civil enforcement powers,[22] while containing none of its own.

The EPBC Act adds an extra or 'top-up' tier of protection (above that of State and/or local government planning law) for MNES. It leaves regulation of other environmental impacts, on non-MNES matters, to sub-national (State and/or local government) law. By contrast, the RFA Act scheme is very much one relying on State forestry regulation. The RFAs encourage State improvement to harmonise upwards such State laws, but Chapter 4 shows these still to be lacking. Chapter 6 exemplifies for nationally listed threatened species how RFA protective clauses are difficult to enforce, and are watered down by governments when too environmentally effective.

This EPBC Act scheme applies across industry sectors in Australia, but with forestry a notable exception. Legal origins of RFA exceptionalism can be seen in the immediate intergovernmental precursor to the EPBC Act, the COAG Heads of Agreement, as discussed below. Political reasons for RFA exceptionalism are considered, to the extent relevant, below at 3.3.2.1.

3.2 COAG Heads of Agreement: RFA Exceptionalism

Importantly for present purposes, the policy of RFA exceptionalism can be seen in the COAG Heads of Agreement (see Chapter 2), which privileged any arrangements

[21] *Regional Forest Agreements Act 2002* (Cth) s 6: see below at 3.8.7.
[22] RFA s 6(4): see below at 3.8.7.3.

made pursuant to the (then emerging) RFA regime over all other aspects of the Heads of Agreement. For example, in the Heads of Agreement's Preamble the parties 'Agree that nothing in this Agreement will affect any arrangements entered into, at any time, as part of a Regional Forest Agreement.'[23] This wording (repeated elsewhere in the Heads of Agreement)[24] promises immunity to an extremely wide range of potential 'arrangements' made pursuant to an RFA. When the Heads of Agreement was executed in November 1997, RFAs were mere bilateral intergovernmental agreements, without the statutory endorsement of the subsequent EPBC Act and RFA Act. This renders all the more extraordinary the Heads of Agreement's privileging of 'any arrangements entered into, at any time, as part of [an RFA]' over all else, including the 'Commonwealth responsibility' for those of Australia's international obligations set out later in the Agreement.

So, it is apparent that the policy of RFA exceptionalism was well in train by at least the November 1997 COAG Heads of Agreement, manifesting in its Preamble far more strongly than in the May 1992 Inter-governmental Agreement on the Environment (IGAE) and December 1992 National Forest Policy Statement (NFPS). The Heads of Agreement would rapidly be developed and enacted in the EPBC Act, which received Royal Assent on 16 July 1999. The policy of RFA exceptionalism found statutory expression initially only in the EPBC Act's ss 38-42 RFA exemptions, discussed next. Subsequently, RFA Act s 6 would reinforce EPBC Act s 38, and excise RFA wood from federal export controls.[25] In December 2006, RFA exceptionalism was extended by the addition of EPBC Act s 75(2B).[26]

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[23] Ibid recital 10 <http://www.environment.gov.au/epbc/publications/coag-agreement/preamble.html>.
[24] For example, this wording is repeated in both para 10 of the body of the Agreement and Attachment 1 cl 11.
[25] See thesis section 3.8.7 below.
[26] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2B) was inserted by the *Environment and Heritage Legislation Amendment Act (No. 1) 2006* (Cth), taking effect in February 2007. See section 3.3.6 below and Chapter 7.

3.3 EPBC Act ss 38-42: Exclusions for RFA Forestry Operations

The EPBC Act Part 3 contains the Act's primary protections for MNES. These prohibit the taking of an action that does, will or is likely to significantly impact certain aspects of a matter of national environmental significance, unless approved (under Part 9) by the Federal Environment Minister.[27] These prohibitions provide the basis for various civil penalties and offences in Part 3. However, all of Part 3 is subject to exceptions in Part 4 of the Act.

The exceptions to Part 3 in EPBC Act Part 4 comprise ss 38-42. These provisions are set out fully in the Appendix to this thesis, as it will be necessary to refer to them at regular intervals. Key components of the provisions are set out below then discussed. First examined is section 40, then its statutory rationale in s 39, as:

- this is logical chronologically, since they appear a hangover from the early period when most RFAs were negotiated; and
- they will be dealt with in this chapter.

Section 38 requires that, to gain exemption from Pt 3, an RFA forestry operation must be 'undertaken in accordance with an RFA.' This more sophisticated and widely applicable exemption will be set out after consideration of ss 39-40. Section 38 and judicial consideration of it are considered further in Chapter 6.

3.3.1 EPBC Act s 40: RFA Regions Without an RFA in Force

Subsection 40(1) provides:

> A person may undertake forestry operations in an RFA region in a State or Territory without approval under Part 9 for the purposes of a provision of Part 3 if there is not a regional forest agreement in force for any of the region.

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[27] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Part 3.

> Note 1: This section does not apply to some forestry operations. See section 42.
>
> Note 2: The process of making a regional forest agreement is subject to assessment under the *Environment Protection (Impact of Proposals) Act 1974*, as continued by the *Environmental Reform (Consequential Provisions) Act 1999*.

In s 40(1):

> ***forestry operations*** means any of the following done for commercial purposes:
>
> (a) the planting of trees;
>
> (b) the managing of trees before they are harvested;
>
> (c) the harvesting of forest products;
>
> and includes any related land clearing, land preparation and regeneration (including burning) and transport operations. For the purposes of paragraph (c), ***forest products*** means live or dead trees, ferns or shrubs, or parts thereof.[28]

Thus, all such 'forestry operations' in an RFA region where there is not an RFA in force;[29] except those subject to EPBC Act s 42 (discussed later), are exempt from EPBC Act Part 3 (which contains the Act's primary protections, associated prohibitions and offences).

The consequence of the EPBC Act s 40 exemptions is that 'forestry operations' (as widely defined above)[30] are exempt from the EPBC Act Pt 3 prohibitions and offences, without requiring EPBC Act assessment or approval. This is so even where such operations significantly impact MNES (eg, declared world heritage (unless inside world heritage boundaries),[31] national heritage, and nationally listed threatened species and ecological communities).[32]

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[28] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40(2).
[29] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40(1).
[30] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40(2).
[31] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 42.
[32] *Forestry Tasmania v Brown* (2007) 167 FCR 34. See Shashi Sivayoganathan, 'Forestry Tasmania v Brown: Biodiversity Protection — An Empty Promise?' (2007) 3 *National Environmental Law Review* 21 and Bob Brown, *The Wielangta Forest* <http://www.on-trial.info/>.

3.3.2 EPBC Act s 39: Claims as to RFAs

EPBC Act s 39 sets out the object of EPBC Act ss 39-41. The 39 object is explained by the Explanatory Memorandum accompanying the Bill that became the EPBC Act as follows:

> The object of this subdivision recognises that in each RFA region a comprehensive assessment is being, or has been, undertaken to address the environmental, economic and social impacts of forestry operations. In particular, environmental assessments are being conducted in accordance with the *Environment Protection (Impact of Proposals) Act 1974*. In each region, interim arrangements for the protection and management of forests are in place pending finalisation of an RFA. *The objectives of the RFA scheme as a whole include the establishment of a comprehensive, adequate and representative reserve system and the implementation of ecologically sustainable forest management.* These objectives are being pursued in relation to each region. *The objects of this will be met through the RFA process for each region and, accordingly, the Act does not apply to forestry operations in RFA regions.*[33]

So here the key reason given as to why the EPBC Act 'does not apply to forestry operations in RFA regions' is that 'The objectives of the RFA scheme as a whole':

- 'include the establishment of a comprehensive, adequate and representative reserve system and the implementation of ecologically sustainable forest management';
- 'are being pursued in relation to each [RFA] region'; and
- 'will be met through the RFA process for each region'.

At the time of EPBC Act enactment this was a futuristic 'aspirational' goal. It is questionable whether it justified ss 40, 41, especially given that environmental objectives of processes such as the RFA are not always realised.

[33] Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1999 (Cth)cl 39 (emphasis added).

Section 39 relevantly describes the RFA process 'of developing and negotiating a regional forest agreement' as involving:

> the conduct of a comprehensive regional assessment under the *Environment Protection (Impact of Proposals) Act 1974* and protection of the environment through agreements between the Commonwealth and the relevant State and conditions on licences for the export of wood chips.[34]

So here the EPBC Act claims that 'protection of the environment' occurs 'through' RFAs and 'conditions on licences for the export of wood chips'. RFAs and export licences will be considered below in reverse order. Neither licences nor RFAs now serve as adequate contemporary tools through which to protect MNES.

3.3.2.1 'conditions on licences for the export of wood chips': s 39

Export licences *had been* (until the EPBC Act) an important Commonwealth environmental regulatory mechanism since the 1970s, as explained below. However, since the EPBC Act abandoned environmental use of them across industries (specifically through the express exclusion of government decisions from its definition of 'action': see s 524 below), their redundancy makes them a curious justification for RFA exceptionalism in s 39.[35] The environmental use of export licences generally, then specifically for wood chips, is summarised below.

The constitutional validity of the Commonwealth's use of such export controls (including for environmental purposes) had been upheld in *Murphyores Incorporated Pty Ltd v Commonwealth.*[36]

Following all the recommendations of the Fraser Island Environmental [Commission of] Inquiry),[37] Malcolm Fraser's Liberal - Country Party Government refused, from

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[34] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 39.
[35] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 524.
[36] (1976) 136 CLR 1.
[37] The first inquiry carried out under the *Environmental Protection (Impact of Proposals) Act 1974* (Cth): Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law* (Federation Press, 1993), 13.

the end of 1976, to grant export licences for mineral sands extracted from a sand mining project then in full production on Fraser Island,[38] the world's largest sand island. The Commonwealth's reasons were that sand mining would harm the island's environment. However, the case was decided before the island became the first place listed on the Register of the National Estate in 1977,[39] and well before the island and it surrounds were listed as the Great Sandy Region World Heritage Area. Accordingly, when the company challenged the Commonwealth's actions, it could not rely on its external affairs power.

Nevertheless, the High Court unanimously upheld the Commonwealth's actions. As Prof Tim Bonyhady explained of the Fraser Government's decisions:

> These decisions were uncontroversial as a matter of law. While Murphyores's action was the first case in which the High Court held that the powers of the Commonwealth extended to protecting the environment, the Court applied settled Constitutional principles, holding that the Commonwealth's unfettered power over exports allowed it to refuse export licences on any basis it liked.[40]

As Geoffrey Lindell later noted, 'The same power exists to prohibit the export of any other goods or products on environmental grounds, such as wood chip exports.'[41] That use of the power became particularly politically prominent during the mid-1990s. As Dr Ajani recounts, the Commonwealth Minister for Resources' annual granting of licences to wood chip exporters 'setting their export volumes for the following year'[42] became a regular 'pre-Christmas stoush':[43] 'As Canberra wound down for Christmas, Australia's annual wood chip conflict wound up.'[44]

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[38] Bonyhady, above n 37, 15.
[39] Ibid 15.
[40] Ibid 15.
[41] Geoffrey Lindell, 'Scope of the Commonwealth's Environmental Powers & Responsibilities' in Paul Leadbeter, Neil Gunningham and Ben Boer (eds), *Environmental Outlook No. 3: Law and Policy* (Federation Press, 1999) 107, 110.
[42] Judith Ajani, *The Forest Wars* (Melbourne University Press, 2007), 6.
[43] Ibid 6.
[44] Ibid 6.

The legal reason for the conflict lay in the separation of Ministerial responsibility for the competing considerations of wood chip exports and protection of environmental values in the forests from which they were sourced: 'Tacked onto the approval process was a triumvirate of legislation to protect the National Estate, endangered species and the environment generally, which the environment minister oversaw.' Specifically, these were, respectively, the:

- *Australian Heritage Commission Act 1975* (Cth);
- *Endangered Species Protection Act 1992* (Cth); and
- *Environment Protection (Impact of Proposals) Act 1974* (Cth).

These were used by the Commonwealth Environment Minister and/or litigated with some success by ENGOs in the 1990s.[45]

Dr Ajani explains how in December 1994 Resources Minister David Beddall, 'approved industry plans to increase native forest wood chip exports to a new high.'[46] He did so contrary to advice from Environment Minister John Faulkner creating a political crisis within the Keating Labor Government over that summer.

This led Keating to threaten to ban all native forest chip-exporting in regions that did not have an RFA in place by 2000, telling a press conference 'What I've decided to do is throw a grenade into the circle and get that particular logjam moving.'[47] Dr Ajani colourfully runs with Keating's rhetoric, arguing that:

> Keating presented his grenade as the breaker of the state-generated logjam, but it was the federal government's environmental protection legislation covering Australia's native forests,

[45] See *North Coast Environment Council v Minister for Resources* (1994) 55 FCR 492; *Tasmanian Conservation Trust v Minister for Resources & Gunns Limited* (1995) 55 FCR 516; Jan McDonald, 'Public Interest Environmental Litigation: Chipping Away Procedural Obstacles' (1995) 12 *Environmental and Planning Law Journal* 140.
[46] Ajani, above n 42, 6.
[47] Ibid 12.

> particularly the export-wood chip controls, that would be blasted away in the regional forest agreements. …
>
> Abolishing the wood chip export controls would gut the federal government's powers to protect the nation's native forests. ….
>
> Under Keating's regional forest agreement plan, the federal government would exit the scene and pass future responsibility for native forest protection back to the states after just one go at securing a national system of native forest reserves. Keating thought that without the federal government's legislative hooks to protect native forests, the environment movement would turn on the real culprit, the state governments. As he later said in parliament, the Wilderness Society and others should say to state governments, 'You have the chainsaw in your hand – not the Commonwealth. You stop it.'
>
> Keating was planning retrograde state's rights that, at a fundamental level, even he disagreed with. Keating believes that, left free of Commonwealth powers, 'the state political system will go for the lowest common denominator result, which will be the so-called protect workers' jobs.'[48]

Keating's political cynicism did not pay off – he lost the 1996 election to John Howard. However, the most significant argument of this thesis is legal, rather than political. It is that:

- Australia has a duty under international law to fulfil its treaty commitments;
- the Commonwealth's undoubted Constitutional power to implement them; and
- the obligations in relevant international environmental conventions

should combine to dissuade the Commonwealth from divesting itself of its statutory power to ensure Australian compliance with its obligations, as has occurred through RFA exceptionalism.

History shows this did not occur. Both PM Keating and PM Howard supported deregulation, consistent with principles of economic rationalism and decreasing the

[48] Ajani, above n 42, 13 (citations omitted).

regulatory burden on business. In the federal environmental sphere, this dovetailed with the Howard Government's development of the EPBC Act, a central element of which was abandoning 'indirect' Constitutional triggers for national environmental regulation (eg export licences), in favour of federal consolidation and accreditation of State EIA and approval processes. Consequently, the wood chip export controls are now long gone and political realism suggests they are not likely to return. Reregulation would see business push back with high political costs. Indirect regulatory tools were decoupled from environmental law by the EPBC Act's abandonment of 'indirect triggers' (see EPBC ACT s 524 below). Then for forestry they were emphatically rendered redundant by the RFA Act ss 6(1), (2) which exempt RFA wood from Australia's export control laws. RFA Act, s 6 (1), (2) are set out below at section 3.8.7 (with some discussion) and in the Appendix.

Uncoupling indirect Constitutional triggers from national environmental law also removed from federal environmental law enforcement agencies such as the Australian Customs and Border Protection Service[49] which has (from its other, eg quarantine operations) an enforcement culture and capacity. While the EPBC Act provides for inspectors legally empowered to enforce the Act, its commencement did not see the creation of a Commonwealth environmental law enforcement agency such as Customs. EPBC Act enforcement therefore largely depends on co-operative arrangements between the federal Environment Department and other federal and State agencies operating with enforcement personnel in the field often with a pro-industry rather than enforcement culture.

3.3.2.2 Limitation to the EPBC Act Meaning of 'Action'

The EPBC Act abandoned its predecessor statutes' use of 'indirect' triggers based on Commonwealth constitutional head of power ostensibly unrelated to the environment. These included, for example, decisions to grant governmental authorisations (eg

[49] See Australian Government, *Australian Customs and Border Protection Service* <http://www.customs.gov.au/>.

wood chip export licences) or funding (which, when made by the Commonwealth, had the potential to require EIA under previous regimes).[50]

Hence, while the EPBC Act s 523 defines the key trigger requirement of 'action' in a wide sense *physically*, s 524 expressly *excludes* from the meaning of 'action' 'a decision by a government body to grant a governmental authorisation (however described) for another person to take an action'. 'Government body' is widely defined to extend beyond the Commonwealth to States, Territories and their agencies.[51] Section 524(3) further provides:

> To avoid doubt, a decision by the Commonwealth or a Commonwealth agency to grant a governmental authorisation under one of the following Acts is not an ***action***:
>
> (a) the *Customs Act 1901*;
>
> (b) the *Export Control Act 1982*;
>
> (c) the *Export Finance and Insurance Corporation Act 1991*;
>
> ...
>
> This subsection does not limit this section.

Similarly, s 524A provides that grant funding is not an *action*:

> Provision of funding by way of a grant by one of the following is not an ***action***:
>
> (a) the Commonwealth;
>
> (b) a Commonwealth agency;
>
> (c) a State;
>
> (d) a self-governing Territory;
>
> (e) an agency of a State or self-governing Territory;
>
> (f) an authority established by a law applying in a Territory that is not a self-governing Territory.

---

[50] See, eg, the *Environmental Protection (Impact of Proposals) Act 1974* (Cth); *Australian Heritage Commission Act 1975* (Cth).
[51] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 524(1).

3.3.2.3 'protection of the environment through [RFAs]': s 39-40

Thus, the key claims of s 39 now remaining relevant are that the RFA process involved the conduct of a comprehensive regional assessment, assessment under the *Environmental Protection (Impact of Proposals) Act 1974* (Cth) and 'protection of the environment through [regional forest] agreements between the Commonwealth and the relevant State'. The first two were included in Prof McDonald's analysis of the RFA process Australia-wide, including Tasmania.[52] The latter 'protection of the environment through [RFAs]' is briefly considered below

It is somewhat curious that s 39 includes RFAs as a rationale for the Subdivision comprising ss 40-41, since that Subdivision relates to regions throughout which an RFA is *not* in force.[53] According to its title, the Subdivision concerns 'Regions which are [still] 'subject to a process of negotiating a regional forest agreement'. The heading of s 40 similarly refers to 'Forestry operations in regions not *yet* covered by regional forest agreements' (emphasis added). But s 40(1) simply authorises 'forestry operations in an RFA region in a State or Territory without approval under Part 9 ... if there is *not* a regional forest agreement in force for any of the region.'[54]

Presumably from s 39 and the Subdivision and s 40 headings, the Subdivision envisages that such RFA regions will eventually see the successful negotiation of an RFA. However, this has not always been the case, such as when the Queensland Government refused to sign the South East Queensland RFA in 1999, and instead signed an agreement with ENGOs and the key industry representative body.[55] Yet, to this day, 'the South East Queensland RFA Region' remains an 'RFA region' as defined in EPBC Act s 41(1)(h).

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[52] Jan McDonald, 'Regional Forest (Dis)Agreements: The RFA Process and Sustainable Forest Management' (1999) 11(2) *Bond Law Review* 295.
[53] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40.
[54] Ibid (emphasis added); Notes 1 and 2 to s 40 omitted.
[55] See, eg, AJ Brown, 'Beyond Public Native Forest Logging: National Forest Policy and Regional Forest Agreements after South East Queensland' (2001) 18 *Environmental and Planning Law Journal* 189.

Given this, the wording of s 40 provides a premature and excessively broad EPBC Act exemption for 'forestry operations in an RFA region in a State or Territory' where there is no RFA in force. Prima facie, this exempts from EPBC Act protections forestry operations in RFA regions where there is no RFA, regardless of whether one is being negotiated or, if so, how long the process takes.

Similarly, if the Commonwealth were to (ever) exercise its ultimate RFA sanction for breach by terminating an RFA, this would not alter the list of 'Regions that are RFA regions' defined by s 41. Consequently, s 40 would replace s 38 in applying to that region, allowing forestry operations to continue without EPBC approval, and without even continuing the s 38 requirement that they be 'undertaken in accordance with an RFA.' Thus, the Commonwealth terminating an RFA would (further) cut its regulation of forestry in the RFA region – hardly a sanction for State breach of the RFA. This result is also a strong disincentive for the Commonwealth to ever terminate an RFA – or allow one to lapse without renegotiation. Hence, s 40 drastically undermines the Commonwealth's supposed sanction for a State's breach of an RFA (termination of the RFA).

For these reasons, in any of the aforementioned scenarios the EPBC Act should apply to forestry in the region, at least until an RFA (or new RFA) enters into force, thereby triggering s 38. To bring about this result, EPBC Act s 40 ought be repealed.

3.3.3 EPBC Act s 41: RFA Regions (Maps in Chapter 1, Figs 1-2)

Until repeal of s 40, 'the South East Queensland RFA Region' could be removed from the EPBC Act s 41(1) list of RFA regions, so as to apply the EPBC Act to forestry operations in that region. By EPBC Act s 41(2), 'The regulations may amend subsection (1)',[56] providing the Minister is first 'satisfied' (a somewhat subjective rather than completely objective test) that the proposed regulations will not give preference (within the meaning of the Constitution s 99) 'to one State, or part of a

[56] The Minister must first be satisfied of the Constitutional s 99 requirements set out in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 41(3).

State, over another State or part of a State.[57] This concise but blunt statement that 'The regulations may amend subsection (1) [of the Act]' (rather than, for example, 'The regulations may prescribe additional RFA regions') is unusual drafting. It could be used to expeditiously remove the South East Queensland RFA Region from the list, thereby making the EPBC Act applicable there. It is unlikely this would unduly burden the timber industry in that region given that the South East Queensland Forest Agreement was so progressive environmentally (much to the chagrin of PM Howard's then Minister for Forests and Conservation, Wilson Tuckey).[58] It would provide EPBC Act protection for SE Queensland forests in the event that the current or future Queensland Government looked to wind back environmental protection and promote logging without an RFA.

However, s 41(2) is a further weakness in EPBC Act protections given that the list of RFA regions can similarly be amended by regulation to add new (or expand existing) RFA regions exempting them from EPBC Act protection against forestry operations. Thus, Tasmania was added as an RFA region upon conclusion of the TRFA after the EPBC Act had commenced. But beyond the proviso precluding giving preference contrary to the Constitution s 99,[59] there is no express prerequisite for amending the RFA region list by s 41. So it could also be used to create new RFA regions, without RFAs, producing the aforementioned s 40 exemption problem. On balance, given the serious ramifications of adding an area to the EPBC Act s 41(1) list of RFA regions, it should require an amending Act, passed by Parliament, rather than mere regulations. Accordingly, to produce this change, EPBC Act s 41(2) should be repealed.

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[57] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 41(3), applying the *Australian Constitution* s 99.
[58] Brown, above n 55.
[59] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 41(3), applying the *Australian Constitution* s 99.

3.3.4 EPBC Act s 38

The EPBC Act's RFA exemptions commence with s 38,[60] which provides:

> (1) Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.
>
> (2) In this Division:
>
> ***RFA*** or ***regional forest agreement*** has the same meaning as in the *Regional Forest Agreements Act 2002*.
>
> ***RFA forestry operation*** has the same meaning as in the *Regional Forest Agreements Act 2002*.
>
> Note: This section does not apply to some forestry operations. See section 42.

Interestingly, the 'in accordance with' wording of EPBC Act s 38(1) has parallels with that in the *Threatened Species Protection Act 1995* (Tas) s 51(3), described in Chapter 4. Section 38 was tested as a key underpinning of the *Wielangta Case*[61] which is the case study focus of Chapter 6.

The definitions of *RFA* and *RFA forestry operation* incorporated from the RFA Act (section 4 in particular) are discussed later in the context of that Act.

3.3.5 EPBC Act s 42

EPBC Act s 42 provides that ss 38-41 do not apply to forestry operations that are:

> (a) in a property included in the World Heritage List; or
>
> (b) in a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention; or

[60] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38 is mirrored by s 6(4) of the *Regional Forest Agreements Act 2002* (Cth), as set out later.
[61] *Forestry Tasmania v Brown* (2007) 167 FCR 34.

> (c) incidental to another action whose primary purpose does not relate to forestry.'[62]

Consequently, such forestry operations are subject to the standard EPBC Act scheme: ie if likely to significantly impact a MNES, then they require EPBC Act assessment and approval. Paragraph 42(a) is considered in Chapter 5 regarding World Heritage, and para 42(c) is considered in Chapter 7 in the context of Gunns Limited's pulp mill. Para 42(b) is not applicable in Tasmania as its forestry operations occur outside the State's Ramsar-listed wetlands. Logging impacts on Ramsar-listed River Redgum forests caused controversy in New South Wales; however that is beyond the scope of this thesis' focus on Tasmanian case studies.

3.3.6 EPBC Act s 75(2B)

There is a further RFA forestry exemption provision, EPBC Act s 75(2B), which came into effect in February 2007. It applies to the EPBC Act's environmental assessment and approval processes so as to prohibit the Minister, in deciding whether an action is a 'controlled action' (and, hence, subject to the Act), from considering 'any adverse impacts of' any RFA forestry operation exempted by s 38 or s 40. Subsection 75(2B) was inserted at a critical stage of the environmental assessment of Gunns Limited's proposed Tamar Valley pulp mill. Less than four months after commencing operation, s 75(2B) was applied by (then) Environment Minister Malcolm Turnbull in deciding, in his assessment of Gunns' proposal to construct *and operate* the mill, not to consider any adverse impacts of RFA forestry operations anticipated to supply wood chip feedstock to the mill. The lawfulness of this approach was upheld by majority in the full Federal Court.[63] Subsection 75(2B) and its application to the EPBC Act assessment of Gunns' pulp mill proposal is the subject of Chapter 7.

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[62] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 42.
[63] *The Wilderness Society Inc v Minister for the Environment and Water Resources* (2007) 166 FCR 154.

3.4 Australia's State of the Forests Report 2008 ('SOFR')

Previous sections of this chapter explained RFA exceptionalism as contained in the EPBC Act, and some of the justifications for it set out in the Act. This section explains how RFA exceptionalism (as enacted in EPBC Act s 38 and RFA Act s 6(4)) has been justified in a key report authored on behalf of all of Australia's Governments for their citizens and the international community. It also demonstrates how Australia's peak forest industry association has used this justification (somewhat embellished) to argue that the statutory scheme of RFA exceptionalism ought be maintained. This section will constitute the final foundation from which the first research question (RQ1) will then be developed.

3.4.1 SOFR: Significance

The SOFR is a significant report given its authorship and functions. It was 'Prepared by the Montreal Process Implementation Group for Australia on behalf of the Australian, state and territory governments.'[64] As such, it carries the authoritative combined voice of all these governments, in the context of a report which performs important dual functions:

> It fulfils a commitment, made through the 1992 *National Forest Policy Statement*, to provide the Australian public with a sustainability report every five years and meets international reporting requirements under the Montreal process.[65]

Furthermore, the SOFR's disclaimer includes a preface that: 'The Australian Government acting through the Bureau of Rural Sciences has exercised due care and skill in the preparation and compilation of information and data set out in this publication.'[66]

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[64] Montreal Process Implementation Group for Australia, above n 9, i.
[65] Colin Grant, 'Foreword' in ibid iii.
[66] Ibid 9 ii.

Given these credentials (and the subsequent use that has been made of it by NAFI as explained below), the following statement in the SOFR deserves much more serious consideration than might ordinarily be warranted if it appeared in a standard government report.

3.4.2 SOFR Claim: RFAs Provide EPBC Act Equivalent Protection

The SOFR contains the following short entry under the heading '*Environment Protection and Biodiversity Conservation Act*':

> Australia's *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) applies to matters of national environmental significance, such as World Heritage properties and Natural Heritage places, wetlands of international importance, nationally listed threatened species and ecological communities, internationally listed migratory species, and Commonwealth marine areas. The Act came into force in July 2000 and was amended in December 2006. *The comprehensive assessments undertaken as part of the RFA process mean that RFAs are regarded as providing an equivalent level of protection to that provided by the EPBC Act. Therefore forestry operations undertaken in RFA areas do not require approval under the Act.*[67]

3.4.3 NAFI's Exaggeration of SOFR Claim of Equivalence

The *latter* (*emphasised by author*) part of the SOFR statement above was repeated by Australia's peak forest industry group, the National Association of Forest Industries (NAFI), in its September 2008 submission to a Senate Committee investigating the EPBC Act.[68] However, a mere three months later the NAFI inflated the above statement in its December 2008 submission to the Independent Review of the EPBC Act, citing the SOFR as authority for the following claim:

> The RFAs *ensure* that production forests are managed for the *same environmental values* provides [sic] for by the EPBC Act, with the addition of recognising these RFA forests as

[67] Ibid 186 (emphasis added).
[68] National Association of Forest Industries (NAFI), Submission No 56 to Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, Inquiry into the Operation of the *Environment Protection and Biodiversity Conservation Act 1999*, September 2008.

> multiple use areas. The Comprehensive Regional Assessments undertaken as part of the RFA process *guarantee* that RFAs provide an equivalent *or higher* standard of protection of environmental values of forests to that provided by the EPBC Act. Therefore forestry operations undertaken in RFA areas already meet the requirements of the EPBC Act.[69]

NAFI subsequently repeated the latter part of the SOFR statement (this time without adding 'or higher') under the heading 'RFAs protect environmental values'.[70]

It appears to this author very difficult to justify the transformation from NAFI's accurate quoting of the SOFR statement in September 2008 to its misleading exaggeration in December of that year.

Certainly NAFI's exaggerations supported the aim of its submission. NAFI summarised its submission's recommendations insofar as they concerned the EPBC Act's operation as follows:

> Operation of the Act
>
> 1. Continue to recognise the legitimacy of the Regional Forest Agreements and maintain the exemption of forestry operations in RFA regions from the EPBC Act.
>
> 2. Introduce a more criteria specific operational structure to the EPBC Act to enable fair and equitable treatment of all proponents and avoid undue public scrutiny and political sensitivity in the approval process.[71]

There is some irony in NAFI's second recommendation 'to enable fair and equitable treatment of all proponents' given that its first recommendation sought 'to maintain the exemption of forestry operations in RFA regions from the EPBC Act' – an exemption the like of which no other industry enjoys.

NAFI's concern to 'avoid undue public scrutiny and political sensitivity in the approval process' seems at odds with transparency, democratic accountability and

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[69] National Association of Forest Industries (NAFI), Submission No 133 to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*, December 2008, 3 (emphasis added), citing Montreal Process Implementation Group for Australia, above n 9.
[70] Ibid 5.
[71] Ibid 1.

the widely acknowledged need for public participation in EIA,[72] including in the EPBC Act's objects to involve, inter alia, 'the community' in environmental protection[73] and management.[74] NAFI's concern may have arisen from public scrutiny of Gunns Limited's politically-charged pulp mill imbroglio, discussed in Chapter 7. This author considers 'public scrutiny and political sensitivity in the approval process' for such a large-scale forestry-related project to be inevitable, and preferable to manage rather than endeavour to circumvent by legislation (as Chapter 7 demonstrates).

NAFI also argued that the RFAs:

> have *ensured* that *suitable areas* have been allocated into the *comprehensive, adequate and representative (CAR) reserve system*, as well as determining *stringent environmental controls for the remaining production forest estate*.'
>
> RFAs provide *certainty and security for forest industries* and communities which depend on forest resources. ….
>
> The RFAs apply a *flexible forest management framework* to ensure that a 'one size fits all' approach is not applied across Australia's diverse forest ecosystems. The RFAs provide for state based governance and regionally specific management of forests as this is more conducive to sustainable forest management than centralised,

[72] See, eg: Rachel Baird, 'Public Interest Litigation and the Environment Protection and Biodiversity Conservation Act.' (2008) 25 *Environmental and Planning Law Journal* 410; Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 7th ed, 2010), 374-6; Ben Boer, 'Social Ecology and Environmental Law' (1984) 1 *Environmental and Planning Law Journal* 233; Donna Craig, 'Citizen Participation in Australian Environmental Decisions' (1986) 2 *North-West Environmental Journal* 115; Thomas Dietz and Paul C Stern (eds), *Public Participation in Environmental Assessment and Decision Making* (The National Academies Press, 2008); Nicola Pain, 'Third Party Rights: Public Participation Under the *Environmental Planning and Assessment Act 1979* (NSW) – Do the Floodgates Need Opening or Closing?' (1989) 6 *Environmental and Planning Law Journal* 26; David Robinson, 'Public Participation in Environmental Decision-Making' (1993) 10 *Environmental and Planning Law Journal* 320; Benjamin J Richardson, 'The Emerging 'Citizenship' Discourse in Environmental Law: a New Zealand Perspective' (2000) 17 *Environmental and Planning Law Journal* 99; Amy K Wolfe, Nichole Kerchner, Tom Wilbanks, 'Public Involvement on a Regional Scale' (2001) 21 *Environmental Impact Assessment Review* 431.

[73] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 3(1)(d), 3(2)(g)(iv).

[74] Ibid.

> broadly prescriptive, Commonwealth based forest management policy.[75]

RFA comprehensive, adequate and representative (CAR) reserves are noted at 3.8.2-3.8.4 below, though Chapter 5 suggests many suitable areas in Tasmania (eg worthy of World Heritage inclusion) were excluded from them. The claimed 'stringent environmental controls for the remaining production forest estate' are examined in Chapter 6 and found wanting.

It is certainly true that 'RFAs provide certainty and [resource] security for forest industries'.[76] Chapter 6 demonstrates how, in contrast to industry's certainty, RFAs' '*flexible forest management framework*' [77] can manifest in their variation by executive government so as to defeat public interest litigation, at the expense of environmental protection.

It is true that 'RFAs provide for state based governance … of forests', the subject of Chapter 4. Here, and in arguing for 'regionally specific management' as against centralised federal management, NAFI neatly summarises the case for devolution to local agencies or 'subsidiarity'. Chapter 4 argues that the former has not worked for environmental protection, and hence the EPBC Act could usefully add a federal 'safety net' where forestry impacts MNES.

NAFI used the SOFR claim to argue that, given the comprehensive regional assessments (CRAs), applying the EPBC Act to RFA forestry operations would be needless duplication, 'without any additional environmental benefit'.[78] To this end, NAFI stated:

> Forest management under the RFAs *reflects the biodiversity and ecological conservation sentiments expressed through the CRAs and*

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[75] National Association of Forest Industries (NAFI), Submission No 133 to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*, December 2008 above n 69, 5 (emphasis added).
[76] Ibid.
[77] Ibid.
[78] Ibid 8.

> *EPBC Act*. The CRAs support and underpin the framework for the RFAs and *extends beyond the requirements of the EPBC Act*, meaning the application of the EPBC Act in these regions is an unnecessary duplication.
>
> …
>
> The EPBC Act, if duplicated over RFA regions, could lead to impost of added and unnecessary regulation burden *without any additional environmental benefit,* and in doing so, *negating RFAs regional approach to conservation.*
>
> Prior to RFAs, conservation assessment and resource allocation was conducted on a site specific (coupe by coupe) basis. The uncertainty this created was reflected by low confidence and negligible investment in processing and value adding technologies. The integrity and effectiveness of the RFAs must be protected as it is a successful, regional based model of sustainable forest management.[79]

So to summarise NAFI's key relevant points, it claimed that:

- CRAs / RFAs extend 'beyond the requirements of the EPBC Act, meaning the application of the EPBC Act in these [RFA] regions is an unnecessary duplication'; and
- duplicating the EPBC Act over RFA regions could add 'unnecessary regulation burden *without any additional environmental benefit*, and in doing so, *negating RFAs regional approach to conservation*.'

If NAFI is correct, then clearly RFA exceptionalism makes policy sense. Repealing it to apply the EPBC Act to RFA regions, they assert:

- would not justify the consequential increased regulatory burden to industry without 'additional environmental benefit'; and
- could even be counter-productive by 'negating RFAs regional approach to conservation'.

[79] Ibid 7-8 (emphasis added).

On the other hand, if the SOFR statement which NAFI used (and abused by exaggeration) is incorrect, then it would appear that RFA exceptionalism is based on, or at least is now being defended by Australia's State and federal governments in the SOFR (and then subsequently by NAFI) on the basis of, a false premise.

Either way, as explained above at 3.4.1, the SOFR is a highly significant and authoritative report serving serious purposes and carrying the combined weight of having been prepared 'on behalf of the Australian, state and territory governments'.[80] NAFI's use of the SOFR statement regarding the EPBC Act further demonstrates the way in which the statement has been (mis)quoted as an authoritative source in an effort to influence a statutory review of the EPBC Act.

The SOFR statement therefore deserves to be tested, as occurs pursuant to RQ1 developed below.

3.5 Methodology

This section develops two tests of sufficiency, related research questions, and hypotheses to address them. These underlay this PhD's research and so are set out below. It is hypothesised that both the research questions are answered in the affirmative. However, the law and literature reviewed suggest it is unlikely that the hypotheses are true. Therefore, the general approach adopted is to test H1 and H2 (concurrently where possible) by means of doctrinal analysis, argument and case study analysis seeking to refute them. Consequently, most of the subsequent thesis chapters are presented largely as argument, leading to the Conclusion chapter in which the hypotheses are rejected and the research questions answered accordingly. The following chapters will be used to test the hypotheses in an effort to establish, or reject them.

[80] Montreal Process Implementation Group for Australia, above n 9, i.

3.5.1 Key Purpose: Sufficient Environmental Protection?

The over-arching purpose of this thesis is to assess and determine whether Australian law *sufficiently* protects matters of national environmental significance (MNES) from adverse impacts by forestry operations.

The question of sufficiency raises value judgments, determined by one's preferences (eg weighting of environmental versus economic considerations, short term versus long term considerations of inter-generational equity, etc). The thesis attempts to address this by adopting as *minimum* tests for sufficiency:

(1) accuracy of the (Australian and State Government's) SOFR statement; and

(2) Australian compliance with its international law duty to fulfil its treaty obligations in good faith.

While not everyone would regard these as ensuring sufficient environmental protection, failure to meet one or both would provide evidence of insufficient protection.

3.5.2 Research Question 1 (RQ1)

As explained previously at 3.3, RFA exceptionalism involves three key statutory exemptions.

1. RFA forestry operations undertaken in accordance with an RFA;[81] and
2. forestry operations in RFA regions where no RFA is in force[82]

are *both* excluded from the EPBC Act's Part 3 protections.

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[81] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38 and *Regional Forest Agreements Act 2002* (Cth) s 6(4).
[82] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40.

3. Subsection 75(2B) of the EPBC Act extends these exemptions. It excludes consideration of any adverse impacts of any such forestry operations by the federal Environment Minister when deciding if an action is a 'controlled action' under the EPBC Act. This is an important threshold decision since only a controlled action requires some form of EIA and ultimately approval under the EPBC Act.

The SOFR statement (as set out at 3.4.2 above) gives the Australian and State Governments' justification for RFA exceptionalism. Given the statement's significance (see3.4 above (developing the basis for RQ1) and 3.5.3), RQ1 tests the SOFR statement. It asks:

RQ1: Is the SOFR statement correct? That is, do the comprehensive assessments undertaken as part of the RFA process mean that RFAs provide an equivalent level of protection to that provided by the EPBC Act, thereby justifying the regime whereby forestry operations undertaken in RFA areas do not require approval under the EPBC Act?

The SOFR statement set out in full at 3.4.2, upon which RQ1 is based, claims in its operative component that 'RFAs provide an equivalent level of protection to that provided by the EPBC Act'. The SOFR does not elaborate further as to the type of protection to which it refers. However it does preface this operative component with a preamble noting that the EPBC Act protects MNES. As explained in Chapter 2, the EPBC Act did narrow the focus of Commonwealth environmental protection to MNES. This is acknowledged in the EPBC Act's first-listed object 'to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance'.[83]

In its context, therefore, the SOFR*'s* claim that RFAs 'provide an equivalent level of protection to that provided by the EPBC Act' implies that RFAs provide EPBC Act-

[83] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(a).

equivalent protection for MNES. That is, protection which the EPBC Act would provide MNES from forestry operations[84] *if* those operations required approval under the EPBC Act, ie *but for* EPBC Act ss 38-42 (and the restatement of s 38 in RFA Act s 6(4)) ['the RFA exemption provisions'].

Accordingly, in order to test the SOFR claim of equivalence, it is necessary to assess the extent to which RFAs protect MNES. This is the primary purpose of the following thesis chapters which examine the extent to which Australian law allows impacts of RFA forestry operations on MNES, both in theory (on the face of the law), and in practice (exemplified in real world case studies).

3.5.3 Hypothesis 1 (H1)

Hypothesis H1 states that RQ1 is answered in the affirmative:

H1: The SOFR statement is correct, ie: The comprehensive assessments undertaken as part of the RFA process mean that RFAs provide an equivalent level of [environmental law] protection to that provided by the EPBC Act. Therefore [this justifies RFA exceptionalism whereby] forestry operations undertaken in RFA areas do not require approval under the EPBC Act.

Applying this to the RFA region of Tasmania, and its Tasmanian RFA ('TRFA'), H1 posits that: In Tasmania, the TRFA provides from forestry operations an equivalent level of [environmental law] protection to that which the EPBC Act would provide *but for* the RFA exemption provisions.

'[A]n equivalent level of [environmental law] protection to that provided by the EPBC Act' corresponds, in effect, with the level of protection provided by the EPBC Act from non-forestry.

[84] 'forestry operations' are defined in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40(2).

3.5.4 Significance of RQ1 (and hence H1)

Testing RQ1 and H1 matter because the SOFR claim upon which they are based is the contemporary inter-governmental rationale for RFA exceptionalism (ie used to justify to Australians and the international community) why 'forestry operations undertaken in RFA areas do not require approval under the [EPBC] Act.'[85]

Former federal Forestry Minister in the Rudd Government, the Hon Tony Burke also claimed, to similar effect, in a Ministerial Statement that RFAs embody a 'rigorous sustainable forest management framework to *ensure the environmental protection* of key forest values including biodiversity, soil and water, and cultural heritage'.[86] He subsequently became the Gillard Government's Environment Minister responsible, inter alia, for administration of the EPBC Act.

If the SOFR equivalence claim (and hence H1) is correct, then it justifies the RFA exemption provisions. Alternately, if the SOFR equivalence claim is incorrect, then the RFA exemptions are being justified through use of a false premise.

Lack of RFA-EPBC Act equivalence would also give forestry an unwarranted regulatory (and hence competitive) advantage over other Australian industry, being the only sector to enjoy such blanket legislative exemptions from the EPBC Act. That would be, amongst other things: contrary to contemporary economic preference for a "level playing field" (embodied in Australia's *National Competition Policy*).

EPBC Act region-wide exemptions elsewhere have been removed. eg An EPBC Act exemption *previously* existed for an action:

- taken in the Great Barrier Reef Marine Park;

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[85] Montreal Process Implementation Group for Australia, above n 9.

[86] Tony Burke, Ministerial Statement, 24 June 2009 (emphasis added), quoted in Bob Brown, 'Bob Brown – Wielangta Landmark Trial' (2009) <http://www.on-trial.info>. Note the Minister's use of 'ensure' as had NAFI: see above n 69. The protection of biodiversity will be considered in Chapter 6.

- by a person authorised by an instrument made or issued under the *Great Barrier Reef Marine Park Act 1975* (Cth), or under an instrument [including regulations] made or issued under that Act;
- to take the action in the place where he or she took it.

This applied to industries operating under the *Great Barrier Reef Marine Park Act 1975* (Cth) regime, for example fishing vessels and tourism operators complying with the *Great Barrier Reef Marine Park Zoning Plan* (the latter also requiring a permit).[87] This exemption has now been *removed* from the EPBC Act which now applies on the Great Barrier Reef – despite its statutory and zoning regime being far more environmentally protective than that of the RFA Act.[88]

3.5.5 EPBC Act Dichotomy between Environmental Protection and Biodiversity Conservation

Both the short title and long title[89] of the EPBC Act distinguish between its broad over-arching goals of environmental protection and biodiversity (or nature) conservation. This duality is reflected in the Act's objects ss 3(1)(a) and (c), while objects ss 3(1)(b) and (d) extend the Act's purview. Recall from thesis Chapter 2, that these first four listed objects of the Act are:

(a) to provide for the *protection of the environment*, especially those aspects of the environment that are matters of national environmental significance; and

(b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and

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[87] See, eg, Tom Baxter, 'Legal Protection for the Great Barrier Reef World Heritage Area' (2006) 3(1) *Macquarie Journal of International and Comparative Environmental Law* 67.
[88] *Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008* (Cth); See further Department of the Environment, Water, Heritage and the Arts, 2008 'Amendments to the *Great Barrier Reef Marine Park Act 1975*: An overview' <http://www.environment.gov.au/coasts/gbr//publications/gbrmp-act-amendment.html>.
[89] The long title of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is 'An Act relating to the protection of the environment and the conservation of biodiversity, and for related purposes'.

(c) to promote the *conservation of biodiversity*; and

(ca) to provide for the protection and conservation of heritage; and

(d) …[90]

After its preliminary Chapter 1, the Act is structured consistently with these objects:

- Its Chapter 2 is titled 'Protecting the environment' (consistently with object (a)), but protects *only* matters of national environmental significance.
- Its Chapters 4 and 3 contain machinery provisions (relating more to object (b)), respectively for:
  - environmental assessments and approvals (EPBC Act Chapter 4); and
  - bilateral agreements between the Australian and State governments under which the former may accredit the latters' environmental assessment and/or approvals processes (EPBC Act Chapter 3).
- Its Chapter 5 is titled 'Conservation of biodiversity and heritage', directly reflecting objects (c) and (ca).

3.5.6 Application of Protection-Conservation Dichotomy to RQ1

The SOFR uses the terms 'conservation' and 'protection' interchangeably in asserting that RFAs provide both:

> A key element of the approach adopted in the 1992 National Forest Policy Statement involved the negotiation of regional forest agreements (RFAs) between the Australian and certain state governments. RFAs are 20-year plans for the *conservation* and sustainable management of certain areas of Australia's native forests; they are designed to provide certainty for forest-based industries, forest-dependent communities and *conservation.* …

[90] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 3(1)(a)-(ca).

> … The *protection* provided by Australia's RFAs is given legal status through the *Regional Forest Agreements Act 2002* (Cwlth).[91]

The SOFR statement (set out at 3.4.2) later claims that RFAs provide 'an equivalent level of *protection* to that provided by the EPBC Act'.[92]

This thesis adopts a strict interpretation of the latter phrases by comparing RFA protection with only the EPBC Act's 'environmental protection' provisions (focused around the Act's 'Chapter 2 – Protecting the environment') – as distinct from its raft of subsequent 'biodiversity conservation' provisions (from the Act's 'Chapter 5 – Conservation of biodiversity and heritage' onwards). This approach gives the benefit of any doubt to the SOFR. If RFA protection falls short of the EPBC Act's environmental protection provisions, then clearly RFAs would fall even shorter of the EPBC Act's full suite of measures for environmental protection plus biodiversity conservation.

3.5.7 Development of RQ2: International Obligations MNES

Chapter 2 explained, inter alia and relevantly for present purposes, background for the following 5-step argument.

1. International Law Duty to Fulfil Treaty Obligations:

A fundamental international law duty of States is to fulfil their treaty obligations in good faith. This duty, derived from the maxim *pacta sunt servanda*, is codified and reinforced in the *Vienna Convention on the Law of Treaties*,[93] as explained in Chapter 2. That Chapter also explained why this thesis accepts as axiomatic that Australia (for reasons of international order and self-interest) should comply with this international law duty.

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[91] Montreal Process Implementation Group for Australia, above n 9, xvi-xvii (emphasis added).
[92] Ibid ii (emphasis added).
[93] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

2. Within the Australian federation, the legal power and responsibility to meet Australia's international obligations vests primarily with the Commonwealth, rather than States.

As explained in Chapter 2, the Australian Government's executive powers enable it to constitutionally sign and ratify treaties without reference to the States. Implementing them in domestic Australian law requires legislation. The High Court has repeatedly upheld the Commonwealth's power to legislate to implement treaties pursuant to its external affairs power.[94] Valid national laws, such as these, over-ride State law to the extent of any inconsistency.[95]

Accordingly, it makes sense that Australia's national (Commonwealth) Parliament and government take responsibility for implementing international obligations and ensuring they are met. Indeed, after the High Court found for the Commonwealth over the States in all 1980s World Heritage disputes, the Australian Government, all State and Territory Governments, and the Australian Local Government Association all acknowledged that compliance with Australia's various environmental treaty obligations is a 'Commonwealth responsibility'.[96] They did so through the IGAE and then through the COAG Heads of Agreement, political precursors to the EPBC Act, as explained in Chapter 2.

3. Australia implements treaty obligations relevant to this thesis (eg for World Heritage and biodiversity) through the EPBC Act.

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[94] *Australian Constitution* s 51(xxxix).
[95] *Australian Constitution* s 109.
[96] See, eg, the "Commonwealth responsibilities" in the IGAE (see Chapter 2) and Council of Australian Governments (COAG), 'Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment', November 1997 <http://www.environment.gov.au/epbc/publications/coag-agreement/>; see also Department of Agriculture, *The RFA Process* Australian Government <http://www.daff.gov.au/rfa/about/process/introduction>.

MNES are those environmental values to which the EPBC Act Part 3 protections apply;[97] provision for their protection being the Act's first-listed object.[98] Those MNES liable to be impacted by Tasmanian forestry operations include, eg World Heritage values and threatened species, for which Australia owes obligations under relevant multilateral environmental agreements (MEAs).Most MNES impacted by forestry operations in Tasmania (eg both the above two) are subject to international obligations under treaties Australia has ratified. As Chapter 2 demonstrated, the EPBC Act narrowed national environmental legislation to MNES by replacing a suite of Acts containing indirect Constitutional triggers for national environmental regulation.

4. The EPBC Act contains exclusions for RFA forestry operations,[99] which have their own legal regime, under the RFA Act. This raises the question of whether Australian law protects MNES from adverse impacts by forestry sufficiently to meet Australia's international environmental obligations.

5. Some would argue that Australia, as a wealthy developed nation, ought to go beyond mere compliance with its international obligations. However, compliance with treaty obligations in good faith is required of Australia under the VCLT. So as a legal duty it can be seen as a reasonably objective, rather than subjective, test of sufficiency. It is therefore suitable to serve as a further minimum legal test for sufficient protection.

3.5.8 Research Question 2 (RQ2)

RQ2 asks whether the RFA exemptions from the EPBC Act undermine Australia's implementation of relevant treaties (those which the EPBC Act implements),

[97] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 34 conveniently lists the 'matter protected' by Part 3 for each MNES.
[98] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1)(a).
[99] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 38-42 and *Regional Forest Agreements Act 2002* (Cth) s 6(4).

preventing the Australian Government from being able to ensure compliance with its international obligations (as required by the principle *pacta sunt servanda*).

RQ2: Does the extent of environmental protection prescribed by the TRFA enable the Australian Government to ensure fulfilment of its obligations under the international environmental conventions implemented by the EPBC Act?

Certain of the case studies will examine this question in the context of the TRFA. If the conventions are not adequately implemented so as to provide the requisite protection of the environment in Tasmania, then that is sufficient evidence that Australia is breaching the principle *pacta sunt servanda*, at least in relation to forestry operations in that State.

3.5.9 Hypothesis 2 (H2)

Hypothesis H2 states that RQ2 is answered in the affirmative.

H2: The EPBC Act, RFA Act and RFAs provide sufficient environmental protection for the Australian Government to ensure that forestry operations do not derogate from fulfilment of its international obligations set out in the relevant MEAs implemented in Australian law by the EPBC Act.

H2 will be challenged through the case studies by evidence that RFA protection for MNES is so poor as to place in jeopardy certain obligations of Australia under MEAs.

3.5.10 Significance of RQ2 (and hence H2)

The significance of RQ2 is set out in its development at 3.5.7. As explained in Chapter 2, the fundamental *pacta sunt servanda* legal duty of nation States to fulfil treaty obligations in good faith[100] is legal reason enough to examine Australia's

[100] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26.

compliance with its treaty commitments. Were further reasons necessary, then the importance which Australia places on being able to describe itself as a 'good global citizen', including for reasons of self-interest (such as securing a seat on the UN Security Council), is one example discussed in Chapter 2.

Furthermore, the Australian Government's responsibility to fulfil Australia's international environmental obligations was acknowledged by it and the governments of all States and Territories in inter-governmental agreements such as the IGAE and the COAG Heads of Agreement.

While the EPBC Act implements a number of international conventions in Australian law, it will be seen that the RFA Act pays little heed to them.

3.5.11 The Case Studies' Significance

As explained in Chapter 1, the case study method adopted is appropriate to policy-based research such as this PhD.

Since each RFA is an agreement between the governments of Australia and one state, it is necessary to ground the analysis consistently in one jurisdiction. The State chosen is Tasmania, for reasons described in Chapter 1.

The case study chapters (commencing from Chapter 5) focus on the MNES most relevant to Tasmanian forestry: World Heritage, National Heritage and threatened species. Australia owes international obligations under treaties in respect of both World Heritage and threatened species. The subsequent chapter also relates to threatened species, but focuses on EPBC Act EIA and the application of EPBC Act s 75(2B). After analysing the relevant law, each of these chapters examines the application of that law to a case study (in two instance, that including Federal Court litigation).

The case studies derive from prominent Tasmanian MNES affected by RFA exceptionalism which have been the subject of high profile disputes between conservationists and governments. These have all been important politically, and

have to varying degrees involved legal argument, particularly the latter two case studies focused on litigation through the Federal Court of Australia testing the application of the EPBC Act to forestry.

3.6 RFA Act Overview

Australia's SOFR states that '… The protection provided by Australia's RFAs is given legal status through the *Regional Forest Agreements Act 2002* (Cwlth).'[101] Clearly, elevating RFA environmental protection from a mere inter-governmental agreement to having legal status under an Act would strengthen protection. Accordingly, understanding the legal status of RFA protection as granted by the RFA Act is vital. This section of the chapter examines the RFA Act accordingly. However, this SOFR claim is of questionable validity. The legal status given by the RFA Act to RFAs does little for environmental protection. In fact, the RFA Act is far more focused on protecting RFA states and their forestry industry from environmental protection by a future national government.

The RFA Act comprises a mere 12 sections and a Schedule of consequential amendments to other Acts. This makes it a very short Act, particularly in comparison to the lengthy EPBC Act. Yet the RFA Act is legally very powerful in providing statutory support to RFAs and reinforcing forestry's exemptions from (export control laws and) the EPBC Act. This will be demonstrated through the Federal Court cases examined in Chapters 6 and 7.

The RFA Act's long title is 'An Act relating to Regional Forest Agreements, and for other purposes'. Following is a summary of its RFA focus, particularly as relevant to RFA exceptionalism.

[101] Montreal Process Implementation Group for Australia, above n 9, xvi-xvii.

3.7 Objects of the RFA Act

The RFA Act sets out its 'main objects' (any other objects being unstated) in s 3 as follows:

> (a) to give effect to certain obligations of the Commonwealth under Regional Forest Agreements;
>
> (b) to give effect to certain aspects of the Forest and Wood Products Action Agenda and the National Forest Policy Statement;
>
> (c) to provide for the existence of the Forest and Wood Products Council.

As will be seen below, the select Commonwealth obligations and aspects of the NFPS given legal effect by the RFA Act privilege State and industry concerns over environmental outcomes.

3.7.1 Object (a): 'Certain Commonwealth obligations under [RFAs]'

Object (a) is most relevant. The Full Court of the Federal Court said of it in *Forestry Tasmania v Brown*:

> [53] One object of the RFA Act is to give effect to certain obligations of the Commonwealth under Regional [sic] Agreements. *Three obligations of the Commonwealth are given effect. The first appears in s 6*, under the heading "Certain Commonwealth Acts not to apply in relation to RFA wood or RFA forestry operations":
>
> [here the Court set out ss 6(1), (2), (4) which are reproduced below at 3.8.7]
>
> [54] *The second obligation* of the Commonwealth given effect *appears in s 7*. The termination of an RFA by the Commonwealth is of no effect unless it is done in accordance with the termination provisions of the RFA. *The third obligation, given effect by s 8, relates to compensation payable by the Commonwealth*. The Commonwealth is liable to pay any compensation that it is required to pay to a State in accordance with the compensation provisions of an RFA. The compensation may be recovered as a debt in a court of competent jurisdiction and is payable out of money appropriated by the Parliament.

> [55] The *provisions of an RFA are not otherwise given effect by the RFA Act.*[102]

So, only three provisions of an RFA (all Commonwealth, rather than State, obligations) are legally entrenched through the RFA Act, as set out in ss 6-8. These favour States and their forestry industries over the Commonwealth and the environment.

The first obligation given effect by the RFA Act appears in s 6, is the exemption of RFA forestry operations and their products from various specified Commonwealth statutes, including the EPBC Act. These are discussed below at thesis section 3.8.7.

The subsequent two 'Commonwealth obligations' given statutory force by the RFA Act ss 7, 8 seek to enshrine RFAs by making them difficult for a future federal government to unilaterally terminate:

- such termination must be done in accordance with the termination provisions of the specific RFA; and
- that RFA's compensation provisions are legally enforceable against the Commonwealth.

3.7.2 Object (b): 'Certain aspects of the … [NFPS]'

Beyond the bilateral RFAs, the other inter-governmental agreement to which the RFA Act purports to give effect (to 'certain aspects' thereof) is the National Forest Policy Statement.[103] However, its pro-environmental clauses are not given effect by the RFA Act. This was highlighted in debate on the RFA Bill by Carmen Lawrence, who had signed the NFPS as former Premier of Western Australia.[104] As a member

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[102] (2007) 167 FCR 34 [53]-[55] (*Wielangta Case Appeal*) (emphasis added); the case is examined in Chapter 6.
[103] The National Forest Policy Statement is defined as 'the National Forest Policy Statement signed on behalf of the Commonwealth and each of the States (other than Tasmania) in December 1992, and on behalf of Tasmania in April 1995': *Regional Forest Agreements Act* 2002 (Cth) s 4.
[104] Ajani, above n 42, 229.

of the House of Representatives, she emphasized that it was not the intention of the NFPS that the Commonwealth 'abrogate all power and responsibility for forest conservation to the states':[105]

> The effect of this legislation is that in the future regional forest agreements will be exempt from Commonwealth legislative controls. There is no requirement that such agreements actually meet the conditions that were laid down in the original National Forest Policy agreed to between the states and the Commonwealth. And, perhaps even more important than that, there will be no opportunity for parliament to determine if this legislative exemption is warranted.[106]

Dr Lawrence clearly summarised the effect of RFA s 6, discussed below. She also flagged a shortcoming in that the RFA Act denies Parliament the capacity to scrutinise and disallow future RFAs. One improvement to the RFA Act would be to render RFAs 'disallowable instruments' at the behest of either the House of Representatives or the Senate. However, this would not solve the problem inherent in EPBC Act s 40 exempting forestry operations in RFA regions lacking a current RFA, as discussed above at 3.3.1.

Dr Lawrence added:

> Such abandonment of Commonwealth responsibilities was not, I must say, was not [sic] envisaged in the original National Forest Policy to which I was signatory – was not envisaged; nor was it agreed to in any of the subsequent RFA documents produced while Labor was in office.[107]

Dr Ajani notes that 'Lawrence correctly interpreted the National Forest Policy Statement' but 'chose her words very carefully in distancing federal Labor from the federal government's surrender of its native forest protection powers to the states.'[108] Ajani points out that 'The absence of documents linking the federal Labor

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[105] Ibid 229.
[106] Ibid 230 quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 9 February 1999 (Carmen Lawrence).
[107] Ibid.
[108] Ibid 230.

government with this policy [of divestment] does not mean this was not Labor's policy when in government',[109] impliedly suggesting a 'don't write don't tell' approach to provide Labor with plausible deniability. Ajani contends that when 'Keating, as prime minister, kick-started the regional forest agreement process [he] knew that its logical conclusion was the termination of the federal legislative controls to protect native forests.'[110]

3.7.3 Object (c): Forest and Wood Products Council

RFAs aside, the main aspect of the NFPS which the RFA Act addresses is the NFPS national goal for wood production and industry development. The RFA Act s 11 provides for the Forest and Wood Products Council and requires that 'The Minister must take all reasonable steps to ensure that, at all times, [it] is in existence … established under the executive power of the Commonwealth'.[111]

Further, 'The Minister must take all reasonable steps to ensure that the functions of the Council include the following:

> (a) to act as a means of liaison between the Minister and stakeholders in the forest and wood products industry, and between different sectors of that industry, in matters relating to that industry;
>
> (b) to facilitate co-operation between different sectors of the forest and wood products industry;
>
> (c) to give advice and information to the Minister in relation to the implementation of the Forest and Wood Products Action Agenda.[112]

Environmental (eg ENGO) stakeholders receive no such statutory rights of access to consult, exchange information with, let alone advise either the Minister for Forestry or Environment Minister. Such a degree of State sponsorship and presumably

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[109] Ibid.
[110] Ibid. Ajani supports her claim in Ch 1 'Keating's Grenade', 6-17.
[111] *Regional Forest Agreements Act 2002* (Cth) s 11(1).
[112] *Regional Forest Agreements Act 2002* (Cth) s 11(3).

associated taxpayer support for 'stakeholders in the forest and wood products industry' would seem to constitute a form subsidy for the industry. This is questionable in terms of contemporary economic policy and possibly under international trade law. These issues are beyond the scope of this thesis, but will be further discussed as areas for further research in the concluding chapter.

3.7.4 General Concerns Regarding Objects of the RFA Act

The title and first object of the RFA Act make clear that the Act is unashamedly pro-RFAs and designed to deliver on federal government commitments to state governments agreed in the RFAs. The RFA Act is by no means the first statute to emerge from inter-governmental agreements and that in itself is not problematic. Indeed, as has been explained, the EPBC Act had such origins in the IGAE and COAG Heads of Agreement.

However, there is something unbecoming in a federal Government agreeing in RFAs to somewhat one-sided 'Commonwealth obligations', then pursuing (which took repeated efforts)[113] passage through Parliament of legislation to, inter alia:

- relieve the Commonwealth of its environmental (and export) regulation of forestry operations (RFA Act s 6); and

- (to the extent possible) to try to bind the hands of a future federal government or Parliament by making it difficult (and potentially exceedingly expensive) for them to unilaterally terminate an RFA, eg to increase forest reserves.

However, the RFA Act was subject to forty-eight hours of Parliamentary debate (albeit not always well-informed)[114] and ultimately passed the Australian Parliament,

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[113] Ajani, above n 42, 218 notes that 'The Howard government presented the Regional Forest Agreements Bill to the House of Representatives four times between 1998 and 2002. At one stage it sat as a double-dissolution trigger with the House of Representatives and Senate refusing to budge over amendments.' Dr Ajani contrasts contributions of members of the House of Representatives supporting the Bill (with the notable exception of Carmen Lawrence) with 'Senate sanity' though the latter's minority parties could not prevent eventual passage of the Bill.

supported by both major parties against vociferous opposition from the Australian Democrats and the Australian Greens. So Parliament endorsed the legislation after exhaustive consideration, notwithstanding its effects.

3.8 Key Definitions in the RFA Act

In marked contrast to the EPBC Act's Ch 8 which contains a veritable dictionary of definitions (including cross-references to definitions earlier in the Act),[115] the RFA Act defines:

- only nine terms generally applicable throughout the Act (including 'National Forest Policy Statement' and 'State');[116] plus
- three terms defined solely for the purposes of specific sections of the Act.[117]

The Act's most presently relevant definition is that of 'RFA or Regional Forest Agreement'. This is set out and then briefly considered below (with further analysis following examination of *Brown v Forestry Tasmania*[118] (in which the definition was judicially considered and applied) in Chapter 6. The other key terms 'RFA forestry operations' and (within that definition) 'forestry operations' are defined in RFA Act s 4 by (somewhat cumbersome) specific reference to each of the RFAs in force at the time of the RFA Act's passage. These terms are explained below at 3.11 in the context of the TRFA.

3.8.1 Definition of 'RFA or Regional Forest Agreement'

The RFA Act defines 'RFA or Regional Forest Agreement' to mean:

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[114] Ibid, Ch 12 'Parliament's Forestry Myths', 218-240 critiquing the debate.
[115] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Ch 8 ss 523-528.
[116] *Regional Forest Agreements Act 2002* (Cth) s 4.
[117] *Regional Forest Agreements Act 2002* (Cth) ss 6(2), 10(7).
[118] Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008).

> an agreement that is in force between the Commonwealth and a State in respect of a region or regions, being an agreement that *satisfies all the following conditions*:
> (a) the agreement was entered into having regard to assessments of the following matters that are relevant to the region or regions:
> (i) environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values;
> (ii) indigenous heritage values;
> (iii) economic values of forested areas and forest industries;
> (iv) social values (including community needs);
> (v) principles of ecologically sustainable management;
> (b) the agreement *provides for* a comprehensive, adequate and representative reserve system;
> (c) the agreement *provides for* the ecologically sustainable management and use of forested areas in the region or regions;
> (d) the agreement is expressed to be for the purpose of providing long-term stability of forests and forest industries;
> (e) the agreement is expressed to be a Regional Forest Agreement.[119]

On its face, this is a strong definition, in two respects. First, it appears that to meet the definition (and hence, legally, be an RFA) it is necessary that an agreement cumulatively 'satisfies all the following conditions' ((a)-(e)). Second, is that the conditions set out in paras (a)-(c) appear to specify key environmental concerns

The two conditions in the definition of RFA which underlie the regime's environmental protection are the requirements that an RFA 'provides for' both:

> (b) 'a comprehensive, adequate and representative reserve system';[120] and
> (c) 'the ecologically sustainable management and use of forested areas in the region or regions'.[121]

The 'comprehensive, adequate and representative' *(CAR)* reserves system protects forests within it by excluding forestry operations. However, some endangered species live outside reserves, eg migratory species such as swift parrots. They depend on off-reserve protection which relies on ecologically sustainable forest management

[119] *Regional Forest Agreements Act 2002* (Cth) s 4 (emphasis added).
[120] *Regional Forest Agreements Act 2002* (Cth) s 4 definition of 'RFA or Regional Forest Agreement' para (b).
[121] *Regional Forest Agreements Act 2002* (Cth) s 4 definition of 'RFA or Regional Forest Agreement' para (c).

(ESFM). RFA Act definitions relevant to both CAR reserves and ESFM are summarised and then briefly considered below.

In Chapter 6, the Federal Court of Australia's application of these two elements in *Brown v Forestry Tasmania*[122] will be examined. It will be seen the phrase 'provides for' prefacing them both in the 'RFA' definition has been interpreted by the Federal Court so as to water down what follows, rendering the RFA regulatory regime extremely permissive.[123] Accordingly, paras (b) and (c) of the definition of an RFA deliver cold comfort for those (such as this author) seeking a strong regulatory regime able to be enforced to ensure compliance, including with Australia's international obligations.

3.8.2 'comprehensive, adequate and representative reserve system'

Each of the three elements of the term '*comprehensive, adequate and representative'* (CAR) above[124] have technical meanings, being foundation scientific principles of modern reserve design. For Australian forestry purposes, inter-governmental commitment to, and definitions of, the three elements of CAR were set out in the NFPS in the following terms:

> … the nature conservation reserve system will be developed on the basis of three principles: comprehensiveness, adequacy and representativeness. These terms are defined thus:
>
> > comprehensiveness — includes the full range of forest communities recognised by an agreed national scientific classification at appropriate hierarchical levels;
> >
> > adequacy — the maintenance of the ecological viability and integrity of populations, species and communities;

[122] (2006) 157 FCR 1, revd (2007) 167 FCR 34.
[123] *Forestry Tasmania v Brown* (2007) 167 FCR 34 [70] - [77].
[124] *Regional Forest Agreements Act 2002* (Cth) s 4 definition of 'RFA or Regional Forest Agreement' para (b).

> representativeness — those sample areas of the forest that are selected for inclusion in reserves should reasonably reflect the biotic diversity of the communities.[125]

The three CAR principles are used not only in forestry but also elsewhere in Australian reserve design, such as, for example, the National Representative System of Marine Protected Areas (NRSMPA).[126] For its purposes, the CAR principles are described in equivalent terms to the NFPS in the inter-governmental *Strategic Plan of Action for the National Representative System of Marine Protected Areas*:

> - **Comprehensiveness**: The NRSMPA will include the full range of ecosystems recognised at an appropriate scale within and across each bioregion.
> - **Adequacy**: The NRSMPA will have the required level of reservation to ensure the ecological viability and integrity of populations, species and communities.
> - **Representativeness**: Those marine areas that are selected for inclusion in MPAs should reasonably reflect the biotic diversity of the marine ecosystems from which they derive.[127]

This thesis does not dispute that the three CAR principles are appropriate foundation stones for reserve design. However, a regulatory problem with their use in the RFA Act regime is that the substantive content of the CAR principles are not defined in any legally enforceable manner, as explained below.

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[125] Commonwealth of Australia, *National Forest Policy Statement*, 1992 Glossary, iii.

[126] Australian and New Zealand Environment and Conservation Council (ANZECC) Task Force on Marine Protected Areas, 'Understanding and Applying the Principles of Comprehensiveness, Adequacy and Representativeness for the NRSMPA, Version 3.1' (Report prepared by the Action Team for the ANZECC Task Force on Marine Protected Areas, Marine Group, Environment Australia (now the Department of Sustainability, Environment, Water, Population and Communities), Australian Government, November 1999) <http://www.environment.gov.au/coasts/mpa/publications/nrsmpa-principles.html>.

[127] Ibid 2 citing Australian and New Zealand Environment and Conservation Council (ANZECC) Task Force on Marine Protected Areas (TFMPA), 'Strategic Plan of Action for the National Representative System of Marine Protected Areas: A Guide for Action by Australian Governments' (Environment Australia (now the Department of Sustainability, Environment, Water, Population and Communities), Australian Government, 1999) 15-16.

3.8.3 RFA Act definition of CAR Reserve System: Critique

To deliver a consistent, prescriptive regulatory requirement in relation to CAR, the RFA Act would:

- adopt the three definitions of CAR from the NFPS (or a subsequent document defining them);[128] and
- impose on RFAs some form of legally binding obligation in relation to them.

The latter appears intended from an initial reading of the RFA Act s 4 definition of 'RFA or Regional Forest Agreement' apparently requiring that an RFA '(b) … provides for a comprehensive, adequate and representative reserve system'.[129]

However, RFA Act s 4 also states that '*comprehensive, adequate and representative reserve system*, in relation to an RFA, has the same meaning as in the RFA.' This immediately undermines the apparent CAR requirement in the RFA Act's definition of 'RFA or Regional Forest Agreement'. So, all that RFA Act s 4(b) actually requires is that an RFA provide for a CAR reserve system *as defined by the RFA in question*.

This is the reverse of the more common situation where a term used in a subordinate instrument is taken (as a matter of statutory interpretation, or as specifically defined) to have the same meaning as in the enabling Act.

Rather than prescribe CAR requirements in the RFA Act (eg by reference to science, or the NFPS), Parliament has left their meaning to the RFA parties, namely the executive governments of Australia and the relevant State. This is all the more problematic given that those parties can agree to vary an RFA at any time.

The TRFA defines 'CAR Reserve System' to mean 'areas under any of the following categories of land tenure …. This reserve system is based on the principles of

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[128] Eg the JANIS Report (1997) defines the three CAR principles in similar terms to the NFPS.
[129] *Regional Forest Agreements Act 2002* (Cth) s 4 definition of 'RFA or Regional Forest Agreement' para (b).

comprehensiveness, adequacy and representativeness, as described in the JANIS Report'.[130] So even in the malleable TRFA, the CAR principles are not objectively defined so as to impose legally binding obligations on reserve design. Rather, land comprising a range of tenures, each providing varying degrees of conservation, is defined to be Tasmania's 'CAR Reserve System'.

The approach of RFA Act s 4 reflects the somewhat *topsy-turvy* nature of the Act and exemplifies a wider concern regarding the Act's scheme, extending beyond the Act's objects. The RFA Act is not designed as a usual enabling Act, which would generally have Parliament delegate power to the Executive for the making of subordinate legislation, bringing with that power limitations such as *ultra vires*. Rather, the Act's first-named object is 'to give effect to certain obligations of the Commonwealth under Regional Forest Agreements', as set out above at thesis section 3.7.13.7, and critiqued there.[131]

The fact that key definitions rely on locating meanings of terms in each specific RFA makes navigating the RFA regime complex and cumbersome, and undermines its potential for useful prescriptive standard-setting. At the very least the RFA Act could standardise terms such as CAR and EFSM, by defining them, if necessary prefaced by a phrase such as 'Unless otherwise apparent from an RFA …'

In terms of structure and content, the standard enabling Act – subordinate legislation relationship would be more in keeping with the appropriate roles of Parliament and the Executive than the RFA model. In contrast to the EPBC Act's enforceable standards for bilateral agreements, the RFA Act does little to harmonise CAR or EFSM nationally, but rather attempts to prevent a future federal government from expanding CAR reserves without State agreement. This comes at the expense of the Commonwealth's capacity to protect native forests:

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[130] Commonwealth of Australia and the State of Tasmania, *Tasmanian Regional Forest Agreement 1997* <http://www.daff.gov.au/forestry/policies/rfa/regions/tasmania> cl 2.
[131] *Regional Forest Agreements Act 2002* (Cth) s 3(a).

- in the wider public interest, and
- specifically, to ensure (in the national and international interest) that Australia's international environmental obligations are upheld.

3.8.4 CAR Reserve System: RFA Act definition Recommendation

To encourage certainty and consistency of meaning, the term 'CAR', plus preferably each of its three constituent elements they should (at least) be uniformly defined in the RFA Act, rather than left to the vagaries of each individual RFA.

Furthermore, a concept as important as 'CAR reserve system' (the main environmental component of the RFA scheme) should not be defined merely by reference to each RFA, since these agreements will be shown to be 'fluid' (in the sense of easily varied by their two government parties). Given that the RFA's meaning of CAR reserve system defines the term for the purposes of *both* the RFA *and* (by virtue of RFA Act s 4) the Act, it follows that the term's meaning can be amended for both purposes by varying merely the RFA. This is a practical problem, and tends against interpreting the RFA Act as imposing, by its RFA definition para (b), a substantive legal requirement upon an RFA in relation to a CAR reserve system. The ease and perils of RFA variation, and the interpretation of the RFA Act s 4 definition of 'RFA or Regional Forest Agreement' will be demonstrated by *Brown v Forestry Tasmania*[132] and explained in Chapter 6.

3.8.5 TRFA meaning of ESFM: First Pass Critique

Recall that the RFA Act definition of 'RFA or Regional Forest Agreement' also requires, inter alia, that an RFA:

> (c) … *provides for* the ecologically sustainable management and use of forested areas in the region or regions.[133]

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[132] Transcript of Proceedings, [2008] HCATrans 202 (23 May 2008).
[133] *Regional Forest Agreements Act 2002* (Cth) s 4 (emphasis added).

These terms are not defined in the RFA Act. However, the TRFA defines ecologically sustainable forest management (ESFM) as forest management and use in accordance with the specific objectives and policies for ecologically sustainable development as detailed in NFPS.

TRFA cl 62, headed 'Ecologically Sustainable Forest Management (ESFM)', provides that the three key elements for achieving ESFM include:

> 1) the establishment of the CAR Reserve System;
>
> 2) the development of internationally competitive forest products industries which are economically sustainable and provide for social and economic benefit; and
>
> 3) the establishment of fully integrated and strategic forest management systems capable of responding to new information.[134]

Including, firstly, 'the establishment of the CAR reserve system' as a key element of achieving ESFM is circular given that, the RFA Act s 4 definition of an RFA sets out separate paragraphs regarding:

> …
>
> (b) 'a [CAR] reserve system'; and
>
> (c) ESFM.

The second element of TRFA cl 62 is more economic than ecological. The third element requires state forestry legislation, policies, codes, plans and management practices to have adaptive management capacity. The Forest Practices System of Tasmania (FPST) is described later in this chapter.[135]

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[134] TRFA cl 62.
[135] See also the TRFA cl 61 definition of 'Forest Management Systems' referring to the 'Tasmanian – Commonwealth Regional Forest Agreement Background Report Part E'.

3.8.6 RFA Act definition of ESFM: Recommendation

For similar reasons to those outlined above regarding the definitions of CAR reserve system, an equivalent law reform approach should also be applied to the meaning of 'Ecologically Sustainable Forest Management' (ESFM).

Para (c) the RFA Act definition of 'RFA or Regional Forest Agreement' closely matches the reference in EPBC Act object s 3(1)(b) to conservation (nearly matching management) and 'ecologically sustainable use of natural resources'. The latter phrase is defined in the EPBC Act to mean:

> use of the natural resources within their capacity to sustain natural processes while maintaining life-support systems of nature and ensuring [the principle of inter-generational equity].[136]

Professor Fisher notes that 'This is part of the notion of ecologically sustainable development.'[137] Indeed, the definition of 'ecologically sustainable use of natural resources' combines EPBC Act s 3A principles of ESD:

(d) with respect to 'the conservation of … ecological integrity'; and

(c) 'the principle of inter-generational equity …'

However, as Prof Fisher observes, 'ecologically sustainable use of natural resources' is defined in s 528 as 'a series of outcomes'[138] whereas EPBC Act s 3A principles of ESD 'reflect processes and strategies more than outcomes.[139]

Given that the TRFA defines ESFM as forest management and use in accordance with the specific objectives and policies for *ecologically sustainable development* (albeit as detailed in NFPS), inter-statutory consistency would dictate applying relevant EPBC Act principles of ESD as key elements of EFSM.

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[136] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 528.
[137] Douglas E Fisher, *Australian Environmental Law: Norms, Principles and Rules* (Lawbook, 2nd ed, 2010), 131.
[138] Ibid.
[139] Ibid.

This could also, inter alia, alleviate the inter-locking circularity in the TRFA cl 62 whereby the three elements of ESFM are said to include a CAR reserve system.

3.8.7 RFA Forestry Operations' Exemptions: RFA Act s 6

Under the section heading 'Certain Commonwealth Acts not to apply in relation to RFA wood or RFA forestry operations', *Regional Forest Agreements Act 2002* (Cth) s 6 succinctly but powerfully sets out the exemptions for RFA forestry from Australia's export control laws and the EPBC Act's protections. Section 6 is a concise encapsulation of RFA exceptionalism, the subsections of which ensure that the RFA exemptions (examined at 3.33.3 above) are entrenched due to the legal and practical reasons explained below.

3.8.7.1 Exempt from Export Control Laws: RFA Act ss 6(1), (2)

RFA Act ss 6 (1), (2) provide:

> (1) RFA wood is not prescribed goods for the purposes of the *Export Control Act 1982*.
>
> (2) An export control law does not apply to RFA wood unless it expressly refers to RFA wood. For this purpose, export control law means a provision of a law of the Commonwealth (other than the *Export Control Act 1982*) that prohibits or restricts exports, or has the effect of prohibiting or restricting exports.

The phrase 'RFA wood' means processed or unprocessed wood (including wood chips) sourced from a region covered by an RFA, except some plantation wood.[140]

The RFA Act s 6(1)-(2) exemptions for RFA wood over-rode the *Export Control (Hardwood Wood Chips) Regulations 1996* (Cth) and the *Export Control (Regional Forest Agreements) Regulations 1997* (Cth) through which the Commonwealth had previously used wood chip export licences as a method of environmental regulation.[141] These RFA Act exemptions from export controls are therefore a

[140] *Regional Forest Agreements Act* 2002 (Cth) s 4.
[141] As explained at thesis section 3.3.2.1.

specific application of the *general* abandonment of 'indirect' Constitutional triggers for Commonwealth environmental involvement, explained above at thesis section 3.3.2 and brought about by EPBC Act's narrow definition of 'action'.[142]

RFA Act ss 6(1)-(2) also rendered (even more) redundant that part of EPBC Act s 39 which seeks to justify RFA exceptionalism on the grounds that the RFA development and negotiation process involved, inter alia, '*protection of the environment through* agreements between the Commonwealth and the relevant State and *conditions on licences for the export of wood chips*'.[143]

Hence, with export wood chip licence conditions comprehensively consigned to history by RFA Act s 6(1)-(2), the thesis will focus on the claim that, as expressed in EPBC Act s 39, 'protection of the environment' occurs 'through' RFAs.

3.8.7.2 Exempt from National Heritage Protection: RFA Act s 6(4)

Subsection 6(3) of the RFA Act, when passed, specifically exempted RFA forestry operations from the *Australian Heritage Commission Act 1975* (Cth). This effect is now achieved by RFA s 6(4). The AHC Act had imposed on Commonwealth administrative decisions (including the grant of export wood chip licences) protective requirements for places (including forest) listed on the Register of the National Estate. However, the *Australian Heritage Commission Act 1975* (Cth) was repealed in 2003.[144]

The Register of the National Estate was replaced by a much narrower National Heritage List which is *now governed by EPBC Act* ss 15B, 15C and Ch 5 Pt 15 Div 1A and managed by the Australian Heritage Council.[145] Hence, the heritage

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[142] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 524 definition of 'action' explained at thesis section 3.3.2.2.
[143] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 39 (emphasis added), explained at thesis section 3.3.2.1.
[144] *Australian Heritage Council (Consequential and Transitional Provisions) Act 2003* (Cth), s 3, Sch 1.
[145] See the *Australian Heritage Council Act 2003* (Cth) .

exemption previously granted by RFA Act s 6(3) is now included in forestry's general exemption from the EPBC Act in RFA Act s 6(4). Former RFA Act s 6(3) is therefore now redundant and, accordingly, has been repealed.

Furthermore, beyond forestry's exemption from the Register of the National Estate need no longer be considered in *any* decisions under the EPBC Act;[146] that Act being confined to the much narrower National Heritage List.

3.8.7.3 Exempt from EPBC Act: RFA Act s 6(4)

Subsection 6(4) of the RFA Act repeats EPBC Act s 38(1) by stating:

> Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

The Revised Explanatory Memorandum accompanying the Bill that became the RFA Act said of clause 6(4):

> This clause provides that forestry operations in regions subject to RFAs are excluded from certain Commonwealth legislation. This is because the environmental and heritage values of those regions have been comprehensively assessed under relevant legislation during the RFA process and the RFAs themselves contain an agreed framework on the ecologically sustainable development of these forest regions over the next 20 years.[147]

That 'agreed framework' was of course one agreed between the State and federal government parties to the RFAs, and opposed by many ENGOs.

Subsection 6(4) ensures consistency between the EPBC and RFA Acts and reinforces the exemption in the subsequent statute. In practical terms, this exemption's repetition entrenches it within the RFA Act by ensuring that any amendment would require action by not only the Environment Minister, but also by the Minister responsible for the RFA Act (the Minister for Forestry).

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[146] See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Note 5 regarding repeal of s 391A on 19 February 2012.
[147] Explanatory Memorandum, Regional Forest Agreements Bill 2002 (Cth).

3.9 Summary of the RFA Act

The RFA Act's long title, objects, key definitions and ss 6-8, are consistent with an Act designed to give statutory force *only* to those three provisions of pre-existing RFAs specified by the Full Court, ie:

- exempting RFA forestry from
  - Australia's export control laws; and
  - the EPBC Act;
- invalidating any purported Commonwealth (but not State) termination of an RFA, 'unless it is done in accordance with the termination provisions of the RFA';[148] and
- ensuring that the Commonwealth is liable (and can be compelled) to pay any compensation which it is required to pay to a State in accordance with the compensation provisions of an RFA.

These provisions of RFAs given statutory force by the RFA Act favour industry and State sponsors of it. By contrast, the RFA Act gives no statutory force to environmental provisions other than through its definition of an 'RFA' (which will be shown in Chapter 6 to have been interpreted by the Federal Court to be less protective than it first appears). Overall, the RFA Act is pro-industry and endeavours to bulwark the RFA status quo against a future Commonwealth government which might be minded to vary it (eg to improve environmental outcomes) without State consent.

[148] *Regional Forest Agreements Act* 2002 (Cth) s 7.

3.10 Tasmanian Regional Forest Agreement [TRFA]

Maps of RFA all RFA regions are n Chapter 1, Fig 1.1 and 1.2. As the DAFF succinctly notes, 'Tasmania's Regional Forest Agreement covers the entire State.'[149] The Australian and Tasmanian governments signed the RFA on 8 November 1997.[150] Since then it has been varied twice, on 19 July 2001 and on 23 February 2007 (examined in Chapter 6).[151] The two Governments also signed a Supplementary Tasmanian Regional Forest Agreement on 13 May 2005.[152]

As noted in Chapter 1, the TRFA has been effectively critiqued from an environmental management perspective by Majewski.[153] This author shares many of her environmental concerns around the impacts of forestry which has occurred under the TRFA (eg logging in high conservation value forests), but this thesis focuses on legal issues. This thesis also extends its consideration to more recent legal developments, particularly in Chapters 6-8 inclusive.

Consistently with the RFA Act (as explained above), the TRFA compartmentalizes Tasmania's (environmental) obligations in Part 2 of the RFA, a Part which is expressly stated to be unenforceable. The significance of this, and key specific clauses of the TRFA, will be examined in Chapter 6.

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[149] Department of Agriculture, *Tasmania: Regional Forest Agreement* (25 June 2009) Australian Government <http://www.daff.gov.au/forestry/policies/rfa/regions/tasmania/rfa>.
[150] Ibid.
[151] Ibid.
[152] Ibid.
[153] Ula Majewski, *The Regional Forest Agreement and the Use of Publicly Owned Native Forests in Tasmania: an Investigation into Key Decision Making Processes, Policies, Outcomes and Opportunities* (Master of Environmental Management Thesis, University of Tasmania, 2007).

3.11 Meaning of 'RFA forestry operations'

The EPBC Act adopts the RFA Act's definition of 'RFA forestry operation'.[154] The RFA Act defines '*RFA forestry operations*' by reference to each RFA region. In Tasmania, the term means:

> 'forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Tasmania) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA).'[155]

The TRFA cl 2 defines 'forestry operations' (and its component 'forest products') in effectively the same terms as EPBC Act s 40(2), set out at 3.3.1 above.

All land in Tasmania is 'land in a region covered by the [T]RFA'.[156] Accordingly, 'forestry operations' anywhere in the State are '*RFA forestry operations*', unless they 'are conducted in relation to … land where those operations are … prohibited by the RFA.' It is interesting that Parliament used the phrase 'conducted *in relation to* land'[157] rather than the simpler and perhaps narrower 'on land', though it does not appear that much turns on this.

3.12 Conclusion

This chapter explained and analysed:

- *how* national statutes (EPBC Act ss 38-41 and RFA Act, particularly s 6) give effect to RFA exceptionalism; and
- *why* RFA exceptionalism is justified according to official reasons proffered.

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[154] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38(2).
[155] *Regional Forest Agreements Act 2002* (Cth) s 4 definition of '*RFA forestry operations*' para (d). *Regional Forest Agreements Act 2002* (Cth) s 4 definition of '*RFA forestry operations*' contains equivalent wording for other States that are parties to one or more RFAs.
[156] TRFA cl 2 definition of 'the Tasmanian Region'.
[157] *Regional Forest Agreements Act 2002* (Cth) s 4 definition of '*RFA forestry operations*' para (d) (emphasis added).

It then developed research questions and associated hypotheses to test governmental justifications for the policy.

RFA exceptionalism is implemented though the EPBC Act's exemptions for RFA forestry operations, contained in EPBC Act ss 38-42 and RFA Act s 6(4), the latter mirroring EPBC Act s 38(1). These provisions are set out in the Appendix to this thesis. The additional EPBC Act s 75(2B) is examined in Chapter 7. These provisions exempt from the EPBC Act:

- forestry operations in an RFA region where an RFA is in force;
- RFA forestry operations in an RFA region where no RFA is in force; and
- consideration of RFA forestry operations when deciding whether a referred action (eg downstream processing) is a controlled action.

EPBC Act s 40 and its justification in s 39 were critically analysed and found to be outdated and/or unconvincing for the reasons summarised below. Then the larger issues around EPBC Act s 38 and RFA s 6(4), and their justification in the SOFR were introduced.

The RFA Act was also examined and doubt was cast on the SOFR claim the RFAs provide equivalent protection to the EPBC Act, which forms the basis for the thesis' research question.

3.12.1 RFA Regions Without any RFA in Force: EPBC Act s 40

An early (and arguably hangover) statutory expression of RFA exceptionalism is EPBC Act ss 39-41.[158] Section 40 exempts from the EPBC Act commercial 'forestry

[158] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 39-41 comprise the Act's Ch 4 Part 4 Division 4 Subdivision B.

operations'[159] in RFA regions without any RFA in force, ie in such an RFA region, forestry operations can occur *without* any Commonwealth regulation under:

- the EPBC Act; nor
- (even the environmental protection, albeit limited, of) a current RFA.

SE Queensland is just such an RFA region.[160] Its State-based forest agreement was reached over a decade ago, but no Queensland RFA was ever concluded.

Section 40's statutory object (s 39, including the EPBC Act's rationale for RFA exceptionalism) is analysed in detail in this chapter's 3.3.2.

The wording of the object of Subdivision B[161] (and relevant headings of the Subdivision),[162] suggest it was intended to apply to RFA regions where a process of 'developing and negotiating [an RFA] *is being, or has been, carried on.*'[163] However, the wording of s 40 contains no such limitation, thereby at least leaving open its continuing application to:

- RFA regions where no RFA is concluded (such as SE Queensland); or
- any region for which an RFA expires or is terminated.

Furthermore, the broad reasons given for RFA exceptionalism in EPBC Act s 39 were scrutinised. Some safeguards s 39 cites (eg export wood chip licences) are now outdated and redundant, having been legislated away initially by the EPBC Act, then confirmed as buried by RFA Act s 6. Accordingly, the benefits of the RFA process

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[159] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40(2).
[160] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 41(1)(h).
[161] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 39.
[162] Subdivision B heading; s 40 heading: see this thesis at 3.3.2.3. Extraneous material such as the Explanatory Memorandum, EPBC Bill 1999 (Cth) cl 39 also talks of 'pending finalisation of an RFA': see this thesis at 3.3.2.
[163] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 39 [emphasis added].

claimed in s 39 are found wanting, certainly not sufficing to justify s 40's expansive exemption across RFA regions without an RFA.

For these reasons, s 40 seems an historic anachronism pre-dating the RFA Act (which does not repeat it). Be that as it may, s 40 is now as a huge loophole, and ought be repealed. Then, in RFA regions without an RFA (such as SE Queensland), the EPBC Act would apply to forestry operations which significantly impact MNES.

3.12.2 RFA Regions With an RFA: RFA Act s 6(4); EPBC Act ss 38

RFAs are merely bilateral inter-governmental agreements. As such, they may impose contractual obligations between their parties, at least insofar as those RFA clauses contained in the parts of an RFA expressed to be enforceable. However, even that is uncertain since Australian contract law presumes against interpreting agreements with a government as satisfying the contractual element of intention to create legal relations.[164]

As a basic matter of contract law, RFAs cannot, in and of themselves, impose legally enforceable obligations on third parties carrying out forestry operations: that task requires legislation. The RFA Act contains no provisions stated to do so, and RFA forestry operations do not need approval under the EPBC Act if 'undertaken in accordance with an RFA'.[165] The exclusion in EPBC Act s 38 is mirrored in RFA Act s 6(4) (thesis section 3.8.7.3).

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[164] While governments and government departments enter into contracts on a daily basis, there are some types of government dealings that do not result in the creation of contractual relations. These usually involve some aspect of the government's political or administrative activities and here the courts are more reluctant to infer an intention to create legal relations. For example, where government schemes or hand outs are concerned, the High Court (and Privy Council in *Australian Woollen Mills*) held in *Australian Woollen Mills Pty Ltd v The Commonwealth* [1955] UKPCHCA 3; (1955) 93 CLR 546 and *Papua & New Guinea v Leahy* (1961) 105 CLR 6 that there was no intention to create legal relations. See further Margaret Allars, 'Administrative Law, Government Contracts and the Level Playing Field' (1989) 12(1) *University of New South Wales Law Journal* 114.

[165] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38 (thesis section 3.3.4). and *Regional Forest Agreements Act 2002* (Cth) s 6(4).

The Australian and State Governments' contemporary justification for RFA exceptionalism is found in their claim in the SOFR that RFAs provide 'equivalent' environmental protection to that of the EPBC Act. This chapter took that SOFR claim at face value, and from it developed research questions and hypotheses to test the most recent official justification of RFA exceptionalism: ie the SOFR claim of RFA equivalence to the EPBC Act's protections.

For the reasons set out in this chapter, that claim is worthy of testing, which the thesis does pursuant to RQ1. The EPBC Act also explains the RFA exemptions by reference to RFAs which the Act describes as involving 'protection of the environment through agreements between the Commonwealth and the relevant State'.[166] However, the extent to which RFAs deliver actual environmental protection is limited and remains a hotly contested argument which this thesis examines.[167]

The question of RFA equivalence to EPBC Act protection is also relevant to the important issue of whether Australia is meeting its international environmental obligations for protection of forests and their environmental values (RQ2). As explained in Chapter 2, the EPBC Act implements in domestic law many of Australia's environmental treaty obligations. This task in respect of forests and their environmental values is, due to RFA exceptionalism, dependent on the RFA regime.

The hypotheses will be tested through Chapters 5-7 inclusive. Chapter 7 will further the analysis by examining s 75(2B)'s prohibition on the Minister considering RFA forestry operations in deciding whether a referred action (eg downstream processing) is a controlled action, etc.

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[166] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 39.

[167] See eg, Senate Standing Committee on Environment, Communications and the Arts, 'Inquiry into the operation of the Environment Protection and Biodiversity Conservation Act 1999' (2009) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eca_ctte/completed_inquiries/2008-10/epbc_act/index.htm> and Department of the Environment, Water, Heritage and the Arts (Australian Government), 'Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*: Discussion Paper ' (Commonwealth of Australia, September 2008) <http://www.environment.gov.au/epbc/review/publications/discussion-paper.html> discussed later in the penultimate chapter of this thesis.

3.12.3 EPBC Act and RFA Act Contrasted on Key Aspects

This chapter's analysis of the RFA Act showed it to be a markedly different statute from the EPBC Act examined in Chapter 2. This can be seen at a high level comparison of the statutes' objects and enforcement mechanisms.

The EPBC Act's primary object is to provide for environmental protection, particularly of MNES. Where triggered the EPBC Act, adds an extra tier of regulatory protection, 'above and beyond' that of State law. The primary object of the RFA Act, by contrast, is to give effect to certain of the Commonwealth's commitments in RFAs. These commitments protect not the environment, but rather, industry against a future Commonwealth government imposing more forest reserves.

Chapter 2 explained that the EPBC Act:

- requires public consultation on EIA[168] and environmental approvals;[169]
- contains substantial penalties for criminal breaches of its offence provisions;[170] and
- enables civil enforcement (eg by injunctions) of certain of its provisions by third parties, reducing procedural obstacles by, for example, much more open standing provisions[171] than the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

In contrast to the EPBC Act, the RFA Act:

- lacks such EIA and environmental approval requirements for RFA forestry operation (it effectively locks in those that occurred during the RFA process, despite their inadequacies);

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[168] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Pt 7.
[169] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) pt 9.
[170] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Pt 3.
[171] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 487, 488.

- establishes no offences;
- enables no enforcement by third parties; and
- contains little by way of Commonwealth enforcement powers other than the extreme measure of terminating an RFA.

Inadequacies of this last blunt instrument include that it:

- would not necessarily providing relief for the environment (eg, EPBC Act s 40 allows forestry operations in an RFA region, without EPBC Act Pt 9 approval, if there is *not* an RFA in force for any of the region);
- would create industry uncertainty, and potentially turmoil; and
- would therefore have high political costs for a federal government (who would be blamed, at least in part, for any resulting industry destabilisation).

It is, therefore, unsurprising that no RFA has been terminated – despite breaches such as those found in *Brown v Forestry Tasmania [No 4]*,[172] examined in Chapter 6.

Neither does the RFA Act provide for any third party enforcement, privileging privity of RFA 'contracts' between their government parties. Instead, the RFA scheme devolves forestry regulation to the states while the RFA Act endeavours to tie the hands of future federal governments, or at least require compensation from them, if minded to unilaterally terminate an RFA and impact resource security (eg by expanding reserves to meet international obligations). While RFAs are subject to reviews, which include public consultation, this does not substitute for the RFA Act's enforcement deficit – both its absence of offences and civil provisions.

[172] (2006) 157 FCR 1, revd (2007) 167 FCR 34

3.12.4 RFA Exemptions from Ominibus EPBC Act: Implications

The EPBC Act's integration of so many environmental regulatory functions in one omnibus statute is unusual in Australia. Previously, most of the MNES addressed by the Act were structurally separated in the statutes which the EPBC Act replaced.

In most Australian States separate statutes generally relate to various environmental and planning functions. For example, the Resource Management and Planning System of Tasmania (RMPST), considered in Chapter 4, comprises a suite of statutes which govern distinct functions.

Some other nations do focus most of their national planning law in a single, over-arching statute (for example New Zealand's *Resource Management Act 1991*); so that consolidation is not necessarily problematic in itself. However, the fact the EPBC Act is an omnibus statute magnifies the impacts of RFA exemptions from it.

For example, this chapter's sections 3.3.2.1 and 3.3.2.2 respectively explained the:

- EPBC Act's abandonment of indirect Constitutional triggers generally;[173] and
- RFA Act's over-ruling of export control laws applying to RFA wood.[174]

As explained, these were previously important methods of environmental regulation. The abandonment of indirect triggers was justified by Government as narrowing federal environmental regulation to focus on more important MNES, over which federal regulatory power would be extended (or deepened) by the EPBC Act. It is not necessary for this thesis to determine whether that achieved a net environmental gain (and Australia seems unlikely to return to a pre-EPBC Act era).

The abandonment of export wood chip licences has seen little by way of replacement national legislation to regulate forestry's environmental impacts, beyond the RFA

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[173] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 524, excluding governmental authorisations from the Act's definition of 'action' [thesis section 3.3.2.2].
[174] *Regional Forest Agreements Act 2002* (Cth) ss 6(1), (2) [thesis section 3.8.7.1].

regime. There is a link to that in the EPBC Act s 38 requirement that for RFA forestry operations to be exempt from EPBC Act protections the operations must be 'undertaken in accordance with' an RFA. On its face, this wording could be thought to require RFA compliance. However, this was comprehensively tested through the Federal Court system in *Forestry Tasmania v Brown*,[175] the focus of Chapter 6's case study. As Chapter 6 explains, RFAs contain express statements that many of their provisions are not intended to be legally enforceable. For this, and other reasons, as will be seen from Chapter 6, judicial application of the RFA exemptions has left a regime in which it is very difficult to use the EPBC Act to enforce RFA compliance against a State such as Tasmania.

The other form of legislation on which the RFA regime's environmental effectiveness depend, is State law. In addition to establishing CAR Reserve Systems, RFAs have potential to harmonise upwards State-based forestry regulation, seeking consistency and improvement across States. For example, the TRFA includes agreement by Tasmania to take specified steps for the development and implementation[176] and amendment[177] of its Forest Management Systems to improve aspects of them. Accordingly, and as part of testing governments' arguments that the RFAs provide equivalent protection to the EPBC Act, the next chapter examines Tasmanian law governing forestry practices.

[175] (2007) 167 FCR 34.
[176] TRFA cl 63.
[177] TRFA cl 64.

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Chapter 4 Forest Practices System of Tasmania (FPST)

4.1 Introduction

Terrestrial resource management (such as forestry) and laws regulating it were, traditionally, the responsibility of Australia's states (given the absence of a specific national environmental head of power in the Australian Constitution). As Chapter 2 explained, since the 1970s the Commonwealth Parliament has extended its law-making to environmental law. In so doing, the Commonwealth has relied mostly on its external affairs power,[1] although the Australian Government also used export licences as a method of environmental regulation from the 1970s for export industries such as mining[2] and forestry. This enabled ENGOs to challenge non-compliant grants of such export licences, if they could overcome procedural obstacles in federal administrative law such as standing.[3]

As Chapter 2 explained, the EPBC Act reduced such procedural obstacles to its enforcement by third parties (eg it grants far more open standing[4] than the *Administrative Decisions (Judicial Review) Act 1977* (Cth)). However, it simultaneously removed 'indirect' triggers for federal environmental involvement, such as grants of Commonwealth funding or licences.[5] In the forestry context, as Chapter 3 showed, the EPBC Act also excluded RFA forestry operations, while

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[1] *Australian Constitution* s 51(xxix).
[2] Starting with sand-mining on Fraser Island: *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1, discussed in Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law* (Federation Press, 1993) and thesis 3.3.2.1.
[3] See, eg, *North Coast Environment Council v Minister for Resources* (1994) 55 FCR 492; *Tasmanian Conservation Trust v Minister for Resources & Gunns Limited* (1995) 55 FCR 516; Jan McDonald, 'Public Interest Environmental Litigation: Chipping Away Procedural Obstacles' (1995) 12 Environmental and Planning Law Journal 140 and thesis Chapter 2.
[4] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 487, 488.
[5] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 524 definition of 'action': see thesis 3.3.2.1.

export control laws (eg wood chip export licences) were abandoned completely by the RFA Act.[6]

Thus, RFA exceptionalism leaves environmental regulation of RFA forestry dependent almost entirely on State law. Each RFA is confined to one State or part-thereof (as apparent from thesis section 3.10). It is therefore necessary to ground the PhD's case study analysis in one jurisdiction (as noted at section 3.5.11). Since that jurisdiction selected is Tasmania, this chapter examines that State's law regulating the conduct of forestry operations. Of particular focus is legislation establishing the Forest Practices System of Tasmania (FPST) since it 'is recognised in the [Tasmanian] RFA as the mechanism to implement appropriate protections for forest practices on public and private land.'[7]

This is necessary since, as this chapter shows, forestry enjoys exemptions from the Resource Management and Planning System of Tasmania (RMPST) – in parallel with federal exemptions for RFA forestry from the EPBC Act. Consequently, in Tasmania, environmental regulation of forestry comes down to reliance on the FPST. Hence, the SOFR claim that RFAs provide equivalent protection to the EPBC Act[8] relies, in the context of the TRFA's legal environmental protection, on legislation establishing and enabling enforcement of the FPST.

However, the chapter's analysis of the FPST's enabling legislation (the *Forest Practices Act 1985* (Tas)) reveals, inter alia:

- numerous exemptions for forestry from the RMPST;[9]

[6] *Regional Forest Agreements Act 2002* (Cth) s 6(1), (2): see thesis 3.8.7.1.
[7] Susan Gunter and Jess Feehely, *Environmental Law Handbook* (Environmental Defenders Office (Tas) Inc, 3rd ed, 2010), Ch 8 'Forestry Operations'.
[8] See thesis 3.4.2 and its following sections in Chapter 3.
[9] See 4.4.

- overly wide-ranging delegated powers to *further* exclude the application of statutes to forestry practices on public (specifically State Forest)[10] or private[11] land; and

- serious systemic flaws from an environmental regulatory perspective.[12]

These raise real questions as to whether the FPST is a sufficiently robust mechanism to be entrusted with the task of implementing appropriate protections from forestry's impacts on the environment. This chapter suggests not; certainly not when the protections appropriate are at a level of EPBC Act equivalence (as per the SOFR statement). This concern will be reinforced by subsequent chapters and their case study analysis of forestry's impacts on environmental values of national environmental significance.

4.1.1 Chapter Overview

The TRFA requires Tasmania to take specified steps for the development and implementation[13] and amendment[14] of its Forest Management Systems (ie the FPST). This chapter explains and critiques the FPST, pointing to design flaws such as its long chain of delegations and over-dependence on self-regulation for a regime largely exempt from environmental law and exclusionary of third party enforcement. These, it is argued, result in a Tasmanian forestry regime susceptible to risks of regulatory capture, and hence requiring oversight through federal law reform.

Specifically, the chapter entails the following sections.

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[10] See 4.4.3.
[11] See 4.4.4.
[12] See 4.6.
[13] TRFA cl 63.
[14] TRFA cl 64.

4.1.2 FPST Objectives: Thesis Section 4.2

The chapter's section 4.3 sets out then analyses the objective of the FPST and its components. The over-arching goal of the FPST is 'sustainable management' of forests with 'due care for the environment', while delivering its various components in a manner that is, to the extent possible, 'self-funding'.[15] Its components summarise the FPST's deliverables which include a mix of outcomes and regulatory design features. Key amongst the latter are self-regulation and 'delegated and decentralized approvals' for forest practices matters.[16] The FPST's goal is then compared to that of the RMPST, in the Chapter's next section.

4.1.3 FPST and RMPST Objectives Compared: 4.3

Section 4.4 contrasts the FPST's statutory objective with the common object of the suite of legislation comprising the Resource Management and Planning System of Tasmania (RMPST), with which most non-forest Tasmanian industry sectors must comply. Prima facie, the former's over-arching goal ('sustainable management' of forests with 'due care for the environment') appears similar to the latter's focus on 'sustainable development'. However, digging deeper by comparing the components of both objects finds the FPST less 'environmentally-friendly' than the RMPST (albeit not to the same extreme extent to which the EPBC Act's objects eclipse the largely non-environmental objects of the RFA Act: see Chapter 3).

4.1.4 FPST Exemptions from the RMPST: 4.4

Section 4.4 demonstrates that Tasmanian legislation grants forestry practices:

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[15] *Forest Practices Act 1985* (Tas) Sch 7.
[16] *Forest Practices Act 1985* (Tas) Sch 7.

(1) waivers from much of the RMPST, specifically those statutes for planning,[17] cultural heritage,[18] and threatened species;[19]and

(2) more potential exemptions for forestry on both public[20] or private[21] land.

This section argues that the extra exemptions at (2) are, firstly, too open-ended. Secondly, they are enabled by Acts which do not themselves specify the laws exempted, but instead delegate that power to subordinate instruments such as forest management plans or regulations. This grants the subordinate instrument great flexibility but at the expense of the more important duty of Parliamentary scrutiny by both Houses. If Parliament is to confer one industry with immunity from public interest environmental legislation, then it should at least overtly and transparently debate and specify that in a statute. This would promote greater accountability and scrutiny by Parliament, and more legal certainty for industry (since immunities specified in a statute would be less susceptible to legal doubt).

4.1.5 RFA Exceptionalism and FPST Exemptions Compared: 4.5

The above exemptions of the FPST from the RMPST are compared in section 4.5 with Commonwealth RFA exceptionalism explained in Chapter 3. To this end, section 4.6 contrasts drafting techniques, but, more importantly, draws out thematic parallels between federal RFA exceptionalism and Tasmanian exemptions of the FPST from the RMPST. The end result is that RFA exceptionalism and its Tasmanian equivalent regime leaves environmental protection (of MNES and the wider environment) from forestry operations in Tasmania legally reliant on the FPST.

[17] See 4.4.1.
[18] Ibid.
[19] See 4.4.2.
[20] See 4.4.3.
[21] See 4.4.4

This is particularly problematic given the FPST's inadequacies set out in the next section.

4.1.6 Problems with the FPST and RFA Reliance on it: 4.6

This chapter's focus is on legislation relevant to the FPST, particularly the system's statutory objective and regulatory design features. Beyond these higher order issues, given the national focus of this thesis it is not necessary to explore the mechanics of the FPST in intricate detail. Relevant authorities and other authors have done so.[22] However, section 4.6 analyses some problems with the FPST, including in FPST enforcement. The enforcement section is based on evidence to a Senate committee in 2003, by one of the two employees of the Forest Practices Board (predecessor to the Forest Practices Authority) with authority to audit forestry operations. His damning evidence demonstrated serious under-enforcement of the FPST by the then Forest Practices Board. While that Board is now the Forest Practices Authority, the statutory shortcomings demonstrated by this chapter are current and endure, suggesting that more is needed to reform the FPST itself, rather than just the Authority administering it.

4.1.7 Conclusion: Problems with RFA Reliance on State Law: 4.7

Section 4.7 concludes with an overall critique of problems inherent in the RFA regime's reliance on State law, as illustrated by the chapter's analysis of the FPST. Key problems identified are:

- Cascading delegations in the FPST

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[22] For explanation of Tasmania's forest practices system, see the Forest Practices Authority's website <http://www.fpa.tas.gov.au/> and Chapter 8 'Forestry Operations' in Gunter and Feehely, above n 7. A critical examination of the current Forest Practices System of Tasmania is developed in Chapter 6 of Ula Majewski, 'The Regional Forest Agreement and the Use of Publicly Owned Native Forests in Tasmania: an Investigation into Key Decision Making Processes, Policies, Outcomes and Opportunities' (2007) Master of Environmental Management thesis, School of Geography and Environmental Studies, University of Tasmania.

- Conflicted Forest Practices Officers
- Co-regulation operating in practice as self-regulation
- FPST under-enforcement and ostracism of enforcement whistle-blowers
- Regulatory capture; and
- Inadequate environmental outcomes.

4.2 Forest Practices System of Tasmania (FPST) Objective

The *Forest Practices Act 1985* (Tas) sets out the 'objective of the State's forest practices system'[23] as follows:

> to achieve *sustainable management* of Crown and private forests with *due care* for the environment while delivering, in a way that is as far as possible *self-funding* –
>
> (a) an emphasis on *self-regulation*; and
>
> (b) planning before forest operations; and
>
> (c) *delegated and decentralized approvals* for forest practices plans and other forest practices matters; and
>
> (d) a forest practices code which provides practical standards for forest management, timber harvesting and other forest operations; and
>
> (e) an emphasis on consultation and education; and
>
> (ea) an emphasis on research, review and continuing improvement; and
>
> (eb) the conservation of *threatened native vegetation communities*; and
>
> (f) provision for the rehabilitation of land in cases *where the forest practices code is contravened*; and
>
> (g) an independent appeal process; and

[23] *Forest Practices Act 1985* (Tas) s 4B(2).

> (h) through the declaration of private timber reserves – a means by which *private land holders are able to ensure the security of their forest resources*.[24]

The following observations on key elements of this objective *emphasized* above suggest a number of weaknesses in both its over-arching goal and the emphasis it places on 'soft-touch' design and enforcement approaches.

4.2.1 Preamble to the FPST Objective: 'sustainable management' with 'due care' while 'self-funding'

The objective's introductory sentence suggests that, overall, the FPST is intended more to facilitate *sustainable management* of forests (used by Forestry Tasmania to mean forestry) than to deliver a strong scheme of environmental protection backed by rigorous, independent enforcement.

The FPST objective's preamble seeks merely 'sustainable management' (undefined in the Act) of forests, rather than the '*ecologically* sustainable management …' contained in the RFA Act definition of 'RFA'[25] or 'ecologically sustainable forest management' (ESFM) seen elsewhere in RFAs.[26] Adding the prefix 'ecologically' would make it an holistic part of '*ecologically* sustainable management …' rather than the current priority of sustainable management (ie forestry), with 'due care for the environment' relegated to an offset against that. Currently, the primary management goal invariably takes priority over environmental protection.

The 'self-funding' element of the objective's preamble is admirable for the public purse, but also carries regulatory risk. Cost-recovery is consistent with EPBC Act's ESD principle of 'improved valuation, pricing and incentive mechanisms')[27] which

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[24] *Forest Practices Act 1985* (Tas) Sch 7 (emphasis added).
[25] *Regional Forest Agreements Act 2002* (Cth) s 4 definition of 'RFA' para (c). See
[26] See, eg, TRFA cl 62 at 3.8.5-3.8.6.
[27] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A(e).

can be effectively applied on a large scale through the 'polluter pays principle' (eg in a national carbon price or the 'environmental management charge' levied on sewage volumes in the Great Barrier Reef Marine Park by its Authority).[28]

Promoting appropriate cost-recovery from forestry proponents (particularly those using public land) to adequately resource the system, regulator and appeal process is attractive in Tasmania where public forestry has at times appeared a drain on, rather than net contributor to cash-strapped State coffers. For example, when the former Forestry Commission was corporatized, its substantial public debt (hundreds of millions) was absorbed by the State to leave the State-owned forestry corporation, Forestry Tasmania, unencumbered by it.[29] Nevertheless, despite two more decades of timber sales from public forests, Forestry Tasmania has in recent years required millions in taxpayer injections to keep it solvent, while State Treasury has provided 'comfort letter(s)' to reassure Forestry Tasmania's lenders that the State would guarantee its debt.

Conversely, however, the 'self-funding' element of the FPST objective's preamble could create risks at the micro-level in a small State like Tasmania if an under-resourced regulator became overly dependent on funds provided by companies it regulates. This risks encouraging a system where 'he who pays the piper calls the tune'. [30] That could induce regulatory capture and, in environmental terms, compromise the FPST's goal of 'due care for the environment'.[31]

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[28] Tom Baxter, 'Legal Protection for the Great Barrier Reef World Heritage Area' (2006) 3(1) *Macquarie Journal of International and Comparative Environmental Law* 67.
[29] Corporatization occurring under the *Forestry Amendment (Forestry Corporation) Act 1994* (Tas). Forestry Tasmania is discussed in Chapter 6, in the context of *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34
[30] An adage noted by Alan Stewart, 'Environmental Risk Assessment: the Divergent Methodologies of Economists, Lawyers and Scientists' (1993) 10 *Environmental and Planning Law Journal* 10, quoted in Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 7th ed, 2010), 372 in the EIA context.
[31] *Forest Practices Act 1985* (Tas) Sch 7.

Probity concerns regarding the administration of Tasmanian forestry date back to at least when:

> In the early 1940s numerous allegations were made about supposed irregularities in forestry administration. Several investigations resulted, culminating in the 1946 royal commission [into forestry administration] which reported that, while it was not common practice, a previous Minister had accepted favours from interested parties. … [I]n what practically amounted to a mood of popular revulsion against the caprices of ministerial management the opportunity was taken also to transfer administrative control of the department to an incorporated Forestry Commission. This effort to take the activity out of politics was made in 1946 …[32]

If the goal was 'to take [forestry] out of politics', then it failed miserably. Tasmanian forestry remained a highly charged political issue and both the Forestry Commission and (as Chapter 6 notes, especially at 6.5.3) its successor Forestry Tasmania, became embroiled in forestry politics.

Public subsidies aside, in terms of the money politics – forestry nexus (to which Wettenhall referred above), Tasmania's most famous example came in 1989 when Edmund Rouse (then chairman of Gunns Limited) attempted (unsuccessfully) to bribe newly elected Labor MP Jim Cox to cross the floor to keep Robin Gray's Liberal Government in power. Author Richard Flanagan claimed that Rouse was 'concerned that the election of a Labor-Green Tasmanian government with a one-seat majority might affect his logging profits.'[33] Cox went to the police, Gray lost government (later becoming a director of Gunns Limited) and Rouse was gaoled. But

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[32] R L Wettenhall, *A Guide to Tasmanian Government Administration* (Platypus Publications, 1968), 243.

[33] Flanagan, Richard, 'Out of Control: The Tragedy of Tasmania's Forests', *The Monthly*, May 2007, 20. See further, eg: *McQuestin v Australian Securities Commission* (1993) 2 Tas R 30;
Report of the Royal Commission into an Attempt to Bribe a Member of the House of Assembly (1991) Hobart, Tasmanian Government Printer
Tom Baxter and Roland Browne, 'Probity Issues Connected with the Tasmanian Pulp Mill' (Paper presented at the Australian Public Sector Anti-Corruption Conference, Brisbane, 28-30 July 2009) <http://www.apsac.com.au/2011conference/2009/2009papers.html>
Stephen Tanner, (1995) 'The Rise and Fall of Edmund Rouse' 4 *Australian Studies in Journalism*, 53-70 at 63 <http://espace.library.uq.edu.au/view/UQ:11179> and Chapter 7.

as Flanagan wrote, 'Gunns continued. Today [in 2007] it is a corporation worth more than a billion dollars, the largest company in Tasmania, with an effective monopoly of the island's hardwood logging.'[34] Today, now, Gunns is in liquidation. More of its story follows in Chapter 7.

In less politically high-profile day-to-day forest management, the establishment of a 'statutorily appointed, independent agency' [35] in the Forest Practices Authority confers a greater degree of resistance against corruption or cronyism risks than previously. However, with no disrespect to its hard-working staff, this statutory survey of the FPST under which they labour to encourage compliance, suggests various regulatory design deficiencies, examined below.

4.2.2 Objective (a): 'emphasis on self-regulation'

The FPST objective's 'emphasis on self-regulation' supports the characterisation by Professor Fisher (who outlined forestry regulation in each Australian State), of the FPST as 'a system for managing forestry resources based more on self-regulation.'[36]

Self-regulation suffers the inherent weakness that, absent effective reporting and enforcement, compliance is left largely to individual firms, who are relied upon to police themselves. This conflicts with the financial incentive of each entity to reduce the cost of its regulatory burden so as to maximise profitability. Professor Gunningham and Grabosky[37] draw on Ayres and Braithwaite's pivotal text [38] to explain that under certain conditions self-regulation could work if coupled with a realistic (as perceived by the regulated entities) risk or threat that non-compliance

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[34] Ibid.
[35] Bates, above n 30, 372.
[36] Douglas E Fisher, *Australian Environmental Law* (Lawbook, 2003) 213.
[37] Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998). See also this review of the book: Ralf Buckley, 'Speak Softly and Carry a Big Stick' (2000) 17(4) *Environmental Planning and Law Journal* 361.
[38] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

will result in government 'ratcheting' or 'escalating response up an instrument pyramid' [39] to more punitive/coercive methods of enforcement of greater cost, intrusiveness and/or severity to business.

Gunningham and Sinclair extend the Braithwaite enforcement pyramid in a manner applicable to forestry:

> A window into solving the first problem [the need for 'regulation to be responsive to the different behaviour of different regulatees'] is provided by John Braithwaite, whose "enforcement pyramid" conceives of responsive regulation essentially in terms of dialogic regulatory culture in which regulators signal to industry their commitment to escalate their enforcement response whenever lower levels of intervention fail. Under this model, regulators begin by assuming virtue (to which they respond with cooperative measures) but when their expectations are disappointed, they respond with progressively punitive/coercive strategies until the regulatee conforms.
>
> Central to Braithwaite's model is the capacity for gradual escalation from low to high intervention, culminating in a regulatory peak which, if activated, will be sufficiently powerful to deter even the most egregious offender. It is possible to reconceptualise and extend this enforcement pyramid in two important ways. First, beyond the state and business, it is possible for third parties to act as quasi-regulators. Similarly, second parties in the form of business may themselves perform a (self) regulatory role. In our expanded model, escalation would be possible up any face of the pyramid, including the second face (through self-regulation), or the third face (through a variety of actions by commercial or non-commercial third parties or both), in addition to government action. [40]

A focus of this legal thesis is the scope for third parties (eg ENGOs) to act as surrogate regulators through law enforcement when self-regulation is inadequate or Government enforcement lacking (as could occur in a climate of regulatory capture). RFA exceptionalism (Chapter 3) freezes third parties out of EPBC Act third party law enforcement. Meanwhile under Tasmanian law FPST exemptions from the

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[39] Neil Gunningham and Darren Sinclair, 'Designing Smart Regulation' in B Hutter (ed), *The Environmental Regulation Reader* (Oxford University Press, 1999) , 3.
[40] Ibid 6-7.

RMPS have a similar effect (Chapter 4). These exclusionary regimes could be viewed as traditional or even naïve models of resource-based regulation. However, compared to and (at least in the EPBC Act) contained in contemporary environmental law (which recognises third parties through relatively open standing), they can reasonably be classified as regulatory capture of the respective federal and State legal regimes.

A core element of this analysis is pithily summarised by Professor White and Heckenberg.[41] They write that environmental regulation relies largely on effective deterrence:

> 'Speak softly and carry a big stick' is an appropriate aphorism for today's environmental regulator, but to be effective there must be certainty that the big stick can and will be used and the how, why and where of its use. It is the anticipation of enforcement action that confers the ability to deter. [42]

Deterrence and enforcement are not mentioned in the FPST's objective, which refers instead to delivering '(e) an emphasis on consultation and education'. Such emphasis is a legitimate and useful initial step to promote ownership and understanding of regulation, and thereby encourage compliance. However, absent the deterrent of 'ratcheting up' through levels of a regulatory pyramid by law enforcement, consultation and education alone involve (in terms of the above aphorism) speaking softly without even carrying a big stick – let alone any certainty as to the stick's use. Hence, the analysis of Gunningham and Grabosky, and White and Heckenberg, would suggest that the emphasis in FPST objectives (a) 'on self-regulation' and (e) 'on consultation and education' are unduly optimistic as to human and corporate nature and unrealistic in terms of environmental effectiveness.

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[41] Rob White and Diane Heckenberg, 'Environmental Harm is a Crime', July 2012, Briefing Paper No. 6, School of Sociology and Social Work, University of Tasmania, 19, quoting B Robinson, (2003) *Review of the Enforcement and Prosecution Guidelines of the Department of Environmental Protection of Western Australia* (Perth: Communication Edge), 11.
[42] Ibid.

Environmental compliance is a cost to business, which profit-maximising firms could be expected to minimise:

- to the extent that the regulatory regime permits this (as in tax minimisation); and

- potentially, even in breach of the regulatory regime (as in tax evasion), if firms are believe the savings to them outweigh the risks of being caught combined with the penalties if they are.

Environmental compliance is invariably cost to business, albeit a necessary one in an industry such as Australian native forestry, where revenues are founded upon extraction of resources from publicly owned 'State forest' which, beyond its wood-value, provides environmental services (eg improving water quality, regulating water quantity (ie flood mitigation), carbon sequestration, environmental amenity, etc). The FPST includes prescriptions designed to protect these values (such as by maintaining streamside reserves, timing the 'regeneration burn' component of clearfell, burn and sow (CBS) forestry so as to minimise, for example well-documented cases of air quality suffering in local communities, tainted grapes in vineyards, and planning to reduce view field impacts). Yet, Tasmania's recent governments have given its forestry industry little reason to fear consequences, present of future, sufficient to encourage compliance under self-regulation. On the contrary, successive State Governments have strongly backed the forestry industry. In such circumstances, the theory (supported by empirical evidence)[43] summarised above predicts that the FPST's aim of self-regulation with '(e) an emphasis on consultation and education' is unlikely to prove environmentally effective.

[43] Gunningham and Grabosky, above n 37.

The tale of chronic FPST under-enforcement described below at 4.6 will provide some evidence as to the potential perils of self-regulation playing out in Tasmania, suggesting that the FPST's (over)emphasis on it and on 'consultation and education' (at the expense of deterrence and enforcement) are design flaws.

4.2.3 Objective (c): 'delegated and decentralized approvals''

The 'delegated and decentralized approvals for forest practices plans and other forest practices matters' underpins FPST through a cascading chain of delegations. In summary, the *Forest Practices Act 1985* (Tas) Pt IV (ss 30-33) enables the making and amendment of the Forest Practices Code (as per objective para (d)) by Tasmania's Forest Practices Authority. The *Forest Practices Act* also enables the owner of land seeking to carry out a forestry operation, or their agent, to prepare a forest practices plan and seek its certification by the Forest Practices Authority. The Authority can delegate the power to certify forest practices plans,[44] and does so, to forest practices officers. These officers may also investigate instances of suspected non-compliance for the Authority, with a view to exercising their powers under section 41.[45]

However, the provisions governing appointment of a forest practices officer are rife with potential for conflicts of interest. The Authority may appoint as a forest practices officer 'any person employed by the forestry corporation [Forestry Tasmania], any person employed by a body corporate which has an involvement in forest practices in Tasmania, ….'[46]

Notwithstanding this, 'a body corporate that is required by section 27(1) to lodge a three-year plan with the Authority is, while it is operating under a three-year plan,

[44] *Forest Practices Act 1985* (Tas) ss 4D(b), 19(5). .
[45] *Forest Practices Act 1985* (Tas) s 4G(2)(c).
[46] *Forest Practices Act 1985* (Tas) 38(1).

entitled to have at least one suitably qualified person *nominated by it* appointed by the Authority to be [a forest practices] officer for the purposes of this Act.'[47] If the authority reasonably refuses the nominated person as not a fit and proper person for appointment, then the corporation can nominate a fresh choice.[48]

Crucially, forest practices officers need not be exclusively engaged by the Authority: they may be officers 'in conjunction with any other office or appointment held by that person',[49] enabling their simultaneous employment by a corporation involved in forestry in Tasmania.

This appointment process produces forest practices officers 'embedded' in, while simultaneously employed by, their nominating forestry company. Clearly, this systemically sows the seeds for potential conflicts of interest.

As noted above, certification and enforcement of forest practices plans, a fundamental unit of the 'decentralized' FPST, depend upon a forest practices officers. So the conflicts of interest they will inevitably encounter could compromise the integrity of the system. The risk of decentralization to this extent is that the regulatory centre (the Forest Practices Authority) may lack sufficient oversight (especially if inadequately resourced and required to deliver on its functions 'in a way that is as far as possible self-funding')[50] to ensure such conflicts are avoided or properly managed and that all its delegates fulfil their duties.

Furthermore, structural flaws such as the employment arrangements for forest practices officers, and the potential for 'revolving door' transfer of staff between the Forest Practices Authority and the entities it regulates, increase the risk of compromises to the independent discharge of the FPA's functions. This is a common

[47] *Forest Practices Act 1985* (Tas) s 38(2) (emphasis added).
[48] *Forest Practices Act 1985* (Tas) s 38(2A), (2C).
[49] *Forest Practices Act 1985* (Tas) s 38(3).
[50] *Forest Practices Act 1985* (Tas) Sch 7.

criticism of environmental regulators (such as Environment Protection Agencies) generally:

> More general commentary has pointed out that due to their dual functions as regulator and enforcer, EPAs and their equivalents have been charged in the past with adopting too conciliatory a relationship with the entities they are meant to be scrutinising (Bricknell 2010: 47).[51]

Given the specific systemic flaws in the FPST, there is a much greater than average risk of the FPA succumbing to this charge, as the evidence described at 4.6 suggests happened to its predecessor Forest Practices Board.

4.2.4 Objective (f): where the Forest Practices Code is Contravened

This goal apparently acknowledges the above and other risks of non-compliance by foreshadowing 'cases where the forest practices code is contravened'. Its 'provision for the rehabilitation of land' in such cases is admirable. However, in forestry matters, where contravention of the Code might lead, for example, to a burn of logged debris escaping into old growth forest, prevention is better than cure wherever possible.

4.2.5 Objective (eb): 'the conservation of threatened native vegetation communities'

This goal is also admirable, backed by an offence of 'the clearance and conversion of a threatened native vegetation community' without a certified forest practices plan.[52] However, the FPST does allow a forest practices plan to authorise the 'clearing and converting threatened native vegetation communities' which phrase is included in the

[51] Rob White and Diane Heckenberg, 'Environmental Harm is a Crime', July 2012, Briefing Paper No. 6, School of Sociology and Social Work, University of Tasmania, 19-20.
[52] *Forest Practices Act 1985* (Tas) s 17(4)(bb).

Act's definition of 'forest practices'[53] (practices exempted from most RMPST legislation).

The *Forest Practices Amendment (Threatened Native Vegetation Communities) Act 2006* (Tas) inserted into the *Forest Practices Act 1985* inter alia:

- objective para (eb) seeking 'the conservation of threatened native vegetation communities';
- s 3A defining their clearance and conversion; and
- the current definition of 'forest practices'.[54]

The meaning of '***clearance and conversion***, of a threatened native vegetation community' is the subject of *Forest Practices Act 1985* (Tas) s 3A.[55] It, inter alia, includes a graphic list of every conceivable method by which one could (and presumably its raison d'être is that some Tasmanians do) 'remove' a threatened native vegetation community from an area of land.[56]

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[53] *Forest Practices Act 1985* (Tas) s 3.
[54] *Forest Practices Act 1985* (Tas) s 3.
[55] *Forest Practices Act 1985* (Tas) s 3A(1) defines '***clearance and conversion***, of a threatened native vegetation community' to mean:
the deliberate process of removing all or most of the threatened native vegetation community from an area of land and –
(a) leaving the area of land, on a permanent or extended basis, in an unvegetated state; or
(b) replacing the threatened native vegetation so removed, on a permanent or extended basis, with … [other vegetation, works, or development]'; or
(c) doing a combination of any of the things referred to in paragraphs (a) and (b).
[56] *Forest Practices Act 1985* (Tas) s 3A(3) non-exhaustive definition of 'remove':
'means remove by any direct or indirect means or combination of means, including but not limited to the following:
(a) burning;
(b) clearfelling;
(c) cutting down;
(d) drowning;
(e) lopping;
(f) ploughing;
(g) poisoning;

However, despite the attention which the objective para (eb) rightly pays to 'threatened native vegetation communities', the objective makes no reference to threatened species of animals, which could be adversely impacted by removal of their habitat.

4.2.6 Objective (h): Private Timber Reserves: Ensuring Land Holders' Security of their Forest Resources

Land declared as a private timber reserve is not 'reserved' for conservation, but rather 'shall be used only for establishing forests, or growing or harvesting timber…'[57] Hence, as will be demonstrated at 4.4.4 below, 'the declaration of private timber reserves' is, very much a means by which *private land holders are able to ensure the [resource] security of their forest resources*, albeit at the expense of communal or public benefits sought by the potentially vast array of legislation from which they are, or can be prescribed by regulation, exempt.

4.3 FPST and RMPST Objectives Compared

The objective of the FPST[58] was set out and its key constituent elements analysed in section 4.2 above. It can be contrasted with the common objectives of the resource management and planning system of Tasmania (RMPST). The RMPST comprises a suite of statutes which govern distinct functions such as:

(h) ringbarking;
(i) thinning;
(j) uprooting.'
The Act's definition of '*clearing of trees'* is mild by comparison. It means the removal of trees by –
(a) clearing, cutting, pushing or otherwise removing; or
(b) destroying the trees in any way.
[57] *Forest Practices Act 1985* (Tas) s 12(1).
[58] *Forest Practices Act 1985* (Tas) Schedule 7.

- land use planning, development assessment and approval;[59]
- environmental management and the regulation of pollution;[60]
- nature conservation, including the management of:
  - terrestrial protected areas;[61] and
  - threatened species;[62]
- heritage, where Tasmania separates the management of:
  - Aboriginal;[63] and
  - non-Aboriginal heritage.[64]

Most of the RMPST statutes contain common 'objectives of the resource management and planning system of Tasmania', set out in Schedules to most of its constituent Acts[65] or cross-referenced in others[66]. They are:

> (a) *to promote the sustainable development* of natural and physical resources *and the maintenance of ecological processes and genetic diversity;* and
>
> (b) to provide for the fair, orderly and sustainable use and development of air, land and water; and

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[59] *Land Use Planning and Approvals Act 1993* (Tas).
[60] *Environmental Management and Pollution Control Act 1994* (Tas).
[61] *Nature Conservation Act 2002* (Tas).
[62] *Threatened Species Protection Act 1995* (Tas).
[63] *Aboriginal Relics Act 1975* (Tas).
[64] *Historic Cultural Heritage Act 1995* (Tas), s 98 of which bluntly provides:
'This Act does not apply to a place that is of historic cultural heritage significance only on the ground of its association with –
(a) Aboriginal history or tradition; or
(b) Aboriginal traditional use.'
[65] See, eg, *Land Use Planning and Approvals Act 1993* (Tas) Schedule 1; *Resource Management and Planning Appeal Tribunal Act 1993* (Tas) Schedule 1; *Tasmanian Planning Commission Act 1997* (Tas) Schedule 1.
[66] See, eg, *Historic Cultural Heritage Act 1995* (Tas) s 5(2).

> (c) *to encourage public involvement* in resource management and planning; and
>
> (d) to facilitate economic development *in accordance with the objectives set out in paragraphs (a), (b) and (c);* and
>
> (e) to promote the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State.[67]

These statutory objectives can be contrasted in both specific and general terms with that of the FPST set out in the *Forest Practices Act 1985* (Tas) Sch 7. For example, that Act does not define 'sustainable management' of forests, the over-arching element of its objective, whereas the RMPST meaning of 'sustainable development' is defined, with its constituent components set out.[68]

FPST objective para '(e) an emphasis on *consultation* and education' is weaker than the more proactive RMPS goal '(c) to *encourage public involvement* in resource management and planning' given:

- 'consultation' (the results of which may be ignored) can be considered a mere subset of 'public involvement' which implies broader public participation rights extending beyond consultation; and
- RMPS goal (c) expressly includes 'public', whereas the FPST's mere 'consultation' might be more limited (eg less public, more industry and government stakeholders).

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[67] See, eg, *Land Use Planning and Approvals Act 1993* (Tas) Schedule 1 (emphasis added).

[68] See, eg, *Land Use Planning and Approvals Act 1993* (Tas) Schedule 1 cl 2 in which 'sustainable development' is defined, for the purpose of RMPST objective clause 1(a), to mean (emphasis added):

> managing the use, development and *protection* of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their health and safety while –
>
> (a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and
>
> (b) *safeguarding* the life-supporting capacity of air, water, soil and ecosystems; and
>
> (c) avoiding, remedying or mitigating *any adverse effects* of activities on the environment.

The contrast in rights to object and appeal between the RMPST (which has relatively open standing for objections to most discretionary planning decisions, then generally enables objectors to pursue merits appeals) and the FPST is described by past and present Principal Solicitors of the Environmental Defenders Office [EDO] (Tas):

> Generally, the forest practices system operates outside the Resource Management and Planning System which regulates most other land uses in Tasmania. The forest practices system is not subject to the same objectives and, significantly, public participation in the forest practices system is generally limited to those who are directly affected (such as adjoining property owners).[69]

For example, a person who owns land more than 100 metres from the boundary of a proposed private timber reserve has no right of objection to its declaration[70] (notwithstanding that such a landowners amenity could be affected by the subsequent forestry operations: eg downstream water impacts, smoke, noise from forestry operations or log trucks). Moreover:

> There is no formal mechanism for objecting to an FPP [forest practices plan] if forest practices occur in accordance with a certified FPP on land that has been approved for forestry (i.e. state forest, private timber reserves, permitted and 'as of right' zones in local government planning schemes).[71]

By contrast, if a landowner's application for a private timber reserve or forest practices plan is refused, they 'can appeal the decision through the Forest Practices Tribunal'.[72]

Generally, the objective of the FPST qualifies '… due care for the environment' with a number of deliverables, implying these could legally detract from the standard of care required to meet 'due care'.

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[69] Gunter and Feehely, above n 7.
[70] Forest Practices Authority, *The Elements of the Forest Practices System* (27 July) <http://www.fpa.tas.gov.au/forest_practices_system/elements_of_the_forest_practices_system>.
[71] Ibid.
[72] Ibid. *Forest Practices Act 1985* (Tas) ss 9, 25 enable these appeals by landowners wishing to pursue forestry operations.

By contrast, the RMPS goal '(d) to facilitate economic development …' is to be '*in accordance with the objectives set out in paragraphs (a), (b) and (c).*' This could be interpreted as rendering facilitation of 'economic development' subject to the three less mercenary goals. In particular, this would help ensure that any economic development facilitated is consistent with the sustainable development promoted pursuant to paragraph (a).

4.4 Forest Practices Exempt from Key Tasmanian Laws

Forestry enjoys both specific, and more open-ended, exemptions from much Tasmanian law. This section demonstrates (at 4.4.1) how the widely defined 'forest practices' are exempt from planning and heritage statutes, key planks of the RMPST. Forestry operations in accordance with a certified forest practices plan are also effectively immune from the *Threatened Species Protection Act 1995* (Tas) (see 4.4.2).

Framework forestry statutes also allow further exemptions to be granted for forestry on public (State forest) or private land. As explained at 4.4.3, a forest management plan (for State forest) must not contain provisions inconsistent with the *Forestry Act 1920* (Tas) or the *Forest Practices Code* (but consistency with the *Forest Practices Act 1985* (Tas) is not specified and should be added). Beyond that, such a plan may prohibit or restrict the exercise of statutory powers in respect of the land to which it applies,[73] notwithstanding any enactment.[74] This power is too broad, and should be limited by specifying excluded statutory provisions in legislation, rather than leaving them to each plan.

[73] *Forestry Act 1920* (Tas) s 22C(3).
[74] *Forestry Act 1920* (Tas) s 22C(4).

Similarly, as explained at 4.4.4, regulations made under the *Forest Practices Act 1985* (Tas) can exclude 'any Act …, and the prescribed provisions of any Act, prescribed in the regulations' from applying to:

- a private timber reserve (a privately-owned 'reserve' used only for forestry);[75] and
- 'anything contained in a certified forest practices plan in so far as that plan relates to a private timber reserve'.[76]

This delegates and relegates the regulation of forestry's environmental impacts to Tasmania's separate forest practices system – the FPST. Its exemptions from a number of key State planning, cultural heritage and environmental statutes (as explained below) eerily echoes RFA exceptionalism (the two exemption regimes are compared at 4.5 below). This leaves Tasmanian forestry operations effectively exempt from not only the EPBC Act, but also from State planning and environmental regulation, other than that contained in the FPST. The FPST itself suffers from the short-comings of over-reliance on self-regulation (see 4.6 below, particularly 4.6.3) and grave risks of regulatory capture (see 4.6.5 below).

4.4.1 Exempt from Planning and Heritage Statutes

The term 'forest practices' is widely defined to mean:

> a) the processes involved in establishing forests, growing or harvesting timber, clearing trees or *clearing and converting threatened* native vegetation communities; and
> b) works (including the construction of roads and the development and operation of quarries) connected with establishing forests, growing or harvesting timber or clearing trees.[77]

[75] *Forest Practices Act 1985* (Tas) s 12(1).
[76] *Forest Practices Act 1985* (Tas) s 26.

All such 'forest practices' are specifically excluded from the definitions of 'works' in (and thereby exempted from the operational provisions of):

- the *Land Use Planning and Approvals Act 1993* (Tas)[78] – the State's key planning statue; and
- the *Historic Cultural Heritage Act 1995* (Tas).[79]

4.4.2 Exempt from *Threatened Species Protection Act 1995* (Tas)

In relation to threatened species, the Environmental Defenders Office (Tas) explains the importance of off-reserve conservation, and the powers of Tasmanian authorities to mitigate adverse impacts of forest practices:

> A significant problem in Tasmania is that most threatened vegetation communities are not in national parks and reserves – they often occur in areas of public and private land that are subject to forest practices. Therefore, it is necessary to ensure that protection of these species is considered when developing and enforcing forest practices plans.
>
> **Threatened species processes**
>
> The *Director of Parks & Wildlife* has power to enter into agreements and make land management plans with both private landowners and public authorities such as *Forestry Tasmania* to protect natural values.
>
> Where *forest practices* are proposed, special values in the forest (including threatened native vegetation communities and threatened species) are identified during the preparation of the *Forest Practices Plan*. These values may be protected in reserves within the coupe or by management prescriptions (such as not operating within line of sight of an eagle nest during the breeding season).
>
> The *Forest Practices Authority* and the *Threatened Species Unit* have developed standard management prescriptions for a range of

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[77] *Forest Practices Act 1985* (Tas) s 3 (emphasis added).
[78] *Land Use Planning and Approvals Act 1993* (Tas) s 3(1) definition of "works": in so far as these occur in State Forest. Forestry operations in private timber reserves enjoy the exemption granted by the *Land Use Planning and Approvals Act 1993* (Tas) s 20(7)(a), discussed below.
[79] *Historic Cultural Heritage Act 1995* (Tas) s 3 definition of "works".

> threatened species. These prescriptions will generally be included in forest practices plans where threatened species are likely to be impacted.
>
> Where a *Forest Practices Plan* has been approved, the forest operator will not be required to obtain any additional permits under the *Threatened Species Protection Act 1995* ….

This is so because a person acting 'in accordance with' a 'certified forest practices plan'[80] may 'take',[81] without a permit under the *Threatened Species Protection Act 1995* (Tas), flora or fauna[82] listed under that Act.[83] The consequence is that 'a person acting in accordance with a certified forest practices plan (issued under the *Forest Practices Act*) is effectively immune from the requirements of the *Threatened Species Act*.'[84]

This parallels the problem for threatened species under federal law whereby RFA exceptionalism excludes RFA forestry operations from the EPBC Act which could otherwise protect them. The particular plight of endangered species (further) threatened by forestry operations will be analysed in detail in Chapter 6.

4.4.3 Forest Management Plan may Exclude the Exercise of Statutory Power

In State Forest, forest practices must be carried out in accordance with the applicable:

- forest practices plan for a particular coupe; and

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[80] within the meaning of the *Forest Practices Act 1985* (Tas): *Threatened Species Protection Act 1995 (Tas)* s 3(1).
[81] '**"take"** includes kill, injure, catch, damage, destroy and collect': *Threatened Species Protection Act 1995* (Tas) s 3(1).
[82] *Threatened Species Protection Act 1995* (Tas) s 3(1) relevantly includes the following definitions:
"fauna" includes any taxon of fauna, whether vertebrate or invertebrate, in any stage of biological development and includes eggs and any part of any such taxon;
"flora" includes any taxon of plant, whether vascular or non-vascular, in any stage of biological development and any part of any such taxon;
[83] *Threatened Species Protection Act 1995* (Tas) s 51(3).
[84] Roland Browne, 'Forestry Exemptions' (Paper presented at the Unlocking the Gates Conference, Hobart, 2002) <http://www.edo.org.au/edotas/>, 4.

- wider forest management plan,[85] which 'is not to contain a provision that is inconsistent with [the *Forestry Act 1920* (Tas)] or the *Forest Practices Code*'.[86]

The above latter inconsistency requirement [in *Forestry Act 1920* (Tas) s 22C(5)] should be extended to add at least that a forest management plan must be consistent with the *Forest Practices Act 1985* (Tas), the enabling legislation for the Code. It should also be simplified to remove the double-negative and strengthen its wording, eg to require that 'a forest management plan must be consistent with' the provisions of the Act[s] and the Code.

A further problem is that *Forestry Act 1920* (Tas) ss 22C(3), (4) provide:

> **(3)** Subject to this Part, a forest management plan may prohibit or restrict the exercise of a statutory power in respect of the land to which it applies.
>
> **(4)** Subsection (3) has effect notwithstanding any other enactment.

Enabling a mere forest management plan to exclude from land to which it applies the exercise of statutory power under any enactment is a sweeping grant of power. Lawyer Roland Browne explained the practical effect of these provisions as follows:

> Hence, a forest management plan that makes some provision for threatened species, environment protection and other consequences of those activities overrides any statute that may require a greater level of environment protection than is afforded by the forest management plan. In other words, by providing for a particular issue, the forest management plan is able to lower the bar below

[85] Forest management plans are prepared by the State-owned forestry corporation (Forestry Tasmania) pursuant to the *Forestry Act 1920* (Tas) Part IIIA, ss 22A – 22K. They can cover 'any area of State forest … and any area of Crown land that, …, is subject to a forestry right': *Forestry Act 1920* (Tas) s 22B.
[86] *Forestry Act 1920* (Tas) s 22C(5).

> statutory requirements for threatened species, conservation or environment protection.[87]

It is true that pursuant to ss 22C(3), (4) a forest management plan could prohibit or restrict the exercise of statutory power relating to such environmental requirements, eg power needed to enforce them against a land owner. The apparently open-ended wording of ss 22C(3), (4) means they could also extend further.

Thus, so long as consistent with the *Forest Practices Code* (not its enabling Act) and the *Forestry Act 1920* (Tas),[88] a forest management plan can prohibit the exercise of any (other) statutory power in respect of the land to which it applies.[89] This prohibition capacity is unduly wide for a mere forest management plan. Subsection 22C(4) is excessive and should be deleted. If s 22C(3) is to remain, it should at least specify the legislation a forest management plan can over-ride, so as to limit the potential exclusions to those Parliament deems necessary.

A similar problem applies to forestry on private land, as discussed below.

4.4.4 *Regulations* can Exempt Private Timber Reserves from *any Act*

A private timber reserve is not a conservation reserve as it 'shall be used only for establishing forests, or growing or harvesting timber in accordance with the Forest Practices Code …'[90] Declaring land to be a private timber reserve[91] enables forestry operations thereon to enjoy a potentially vast array of statutory immunities.

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[87] Browne, above n 84, 3-4.
[88] *Forestry Act 1920* (Tas) s 22C(5).
[89] *Forestry Act 1920* (Tas) s 22C(3), (4).
[90] *Forest Practices Act 1985* (Tas) s 12(1).
[91] in accordance with *Forest Practices Act 1985* (Tas) s 11(1).

Firstly, 'Nothing in any planning scheme or special planning order affects … forestry operations conducted on [such] land',[92] so the operations 'do not require any development permits.'[93]

Moreover, the *Forest Practices Act 1985* (Tas) s 12(2) provides that:

> '(2) … any Act prescribed in the regulations, and the prescribed provisions of any Act prescribed in the regulations shall not apply to the private timber reserve.'[94]

Further to s 12(2), the *Forest Practices Act 1985* (Tas) s 26, titled, 'Non-application of other Acts to certified forest practices plan' provides:

> Any Act prescribed in the regulations and the prescribed provisions of any Act prescribed in the regulations shall not apply to or affect anything contained in a certified forest practices plan in so far as that plan relates to a private timber reserve.

The *Forest Practices Act 1985* (Tas) ss 12(2), 26 should have specified *in that Act* which provisions of other legislation do not apply to, respectively:

- a private timber reserve; and
- 'anything contained in a certified forest practices plan in so far as that plan relates to a private timber reserve.'

Instead, however, both the above can be granted immunity from 'Any Act *by regulation* ..., and the prescribed provisions of any Act prescribed in the regulations'.[95] Parliament's delegation to regulations of such sweeping powers to exclude statutes leaves a lack of the Parliamentary oversight befitting such

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[92] *Land Use Planning and Approvals Act 1993* (Tas) s 20(7)(a).
[93] Gunter and Feehely, above n 7.
[94] *Forest Practices Act 1985* (Tas) s 12(2).
[95] *Forest Practices Act 1985* (Tas) ss 12(2), 26.

potentially wide exclusions, particularly given the public interest nature of the environmental legislation that could potentially be swept aside.

There is no right of consultation, let alone veto, by agencies responsible for administering legislation excluded under *Forest Practices Act 1985* (Tas) ss 12(2), 26. However, regulations under the *Forest Practices Act 1985* (Tas) can only be made for the purposes of the Act 'on the recommendation of the [Forest Practices] Authority'.[96] This precondition for regulations provides some safeguard, but can occur only after the FPA 'has consulted with Private Forests Tasmania as to the subject-matter of the proposed regulations'.[97]

Private Forests Tasmania is established under the *Private Forests Act 1994* (Tas) with the over-riding objective 'to facilitate and expand the development of the private forest resource in Tasmania in a manner which is consistent with sound forest land management practice.'[98] It works to promote forestry on private land, so its role is not further explored here, as the predominant focus of this thesis is forestry on public land. Potential further research could include comparisons between Tasmanian private forestry and that in other States.[99]

It should also be noted (in defence of *Forest Practices Act 1985* (Tas) ss 12(2), 26)) that the *Subordinate Legislation Act 1992* (Tas) imposes some procedural and substantive requirements prior to the making of Tasmanian subordinate legislation, which is widely defined.[100]. However, these requirements (similar to those applying

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[96] *Forest Practices Act 1985* (Tas) s 50(1).
[97] *Forest Practices Act 1985* (Tas) s 50(2).
[98] *Private Forests Act 1994* (Tas) s 5, Schedule 1 item 1.
[99] See, eg, James Prest, 'The Forgotten Forests: The Regulation of Forestry on Private Land in NSW 1997-2002' in Daniel Lunney (ed), *Conservation of Australia's Forest Fauna* (Royal Zoological Society of New South Wales, 2nd ed, 2004) 297.
[100] Under the *Subordinate Legislation Act 1992* (Tas) s 3(1),'subordinate legislation' means:
'a regulation, rule or by-law' which requires the Governor's consent; or
'any other instrument of a legislative character that is –
(i) made under the authority of an Act; or

to national legislative instruments under the *Legislative Instruments Act 2003* (Cth)), are focused on:

- reducing the burden of 'regulatory impact' and its compliance costs;[101] and
- ensuring legal compliance with the enabling Act.

The Tasmanian Parliament's Subordinate Legislation Committee enhances Parliamentary scrutiny of subordinate legislation, most of which can be disallowed by either House within the prescribed period from its tabling.[102] However, both mechanisms require MPs to actively monitor and oppose subordinate instruments which would otherwise go largely unnoticed, certainly by the media. In this author's view, neither are sufficient safeguards to reliably defend the substantial public interest in maintaining statutory environmental protections consistently across all industries, against the risk of regulation *further* exempting forestry from:

- environmental statutes; and/or
- compliance powers needed to effectively enforce them.

(ii) declared by the Treasurer … to be subordinate legislation for the purposes of this Act.'

[101] For example, the *Subordinate Legislation Act 1992* (Tas) requires that compliance with 'guidelines', issued by the Treasurer, precede a decision to pursue regulation (requiring that alternatives, including no regulation, be considered, etc): s 4. If subordinate legislation is pursued, then the Act requires it be preceded by a regulatory impact statement (RIS). Its general purpose is to require government to justify 'proposed subordinate legislation which would impose a significant burden, cost or disadvantage on any sector of the public': s 5(1). In practice, such a sector could include consumers or a business sector.
The RIS process incentivises Government to minimise new 'red tape' or 'green tape' causing any 'stakeholders' (in Government-speak) a compliance burden or cost. This could potentially stifle the making of some regulations for environmental or other public interest purposes, producing a regulatory chilling effect. It is unlikely to so affect regulations made under *Forest Practices Act 1985* (Tas) ss 12(2), 26) to facilitate economic activity in forestry by reducing statutory environmental requirements.

[102] Rick D Snell, Helen Townley and Darren J Vance, 'The Tasmanian Subordinate Legislation Committee - Lifting the Scrutiny Veil by Degrees' (1999-2000) 4(2) *Deakin Law Review* 1.

Thus, *Forest Practices Act 1985* (Tas) ss 12(2), 26 delegate excessive and undue power to the Forestry Minister, without the degree of Parliamentary scrutiny that would apply were exemptions instead specified in the *Forest Practices Act 1985* (Tas). Requiring amendment of the Act to achieve an exemption would be more likely to attract the level of Parliamentary and media scrutiny befitting such a radical outcome. That said, the author's electronic searches did not unearth any regulations yet made under s 26, but that does not restrict the potential for it to be used in the future. Given no regulations prescribing exemptions have been needed to date, the power could be removed from the *Forest Practices Act 1985* (Tas) ss 12(2), 26 with little practical impact. If and when there is a case for exemptions beyond those already in the FPST, a statutory amendment could be made, though in this author's view the system already contains too many.

Finally, the *Forest Practices (Private Timber Reserves Validation) Act 1999* (Tas) validates, retrospectively for the time before the Act received the Royal Assent:

- private timber reserves declared or purportedly declared;
- private timber reserve applications; and
- actions of the Forest Practices Board in relation to applications.

Such 'doubts removal' legislation has become an all too common feature of contemporary Tasmanian resource management law,[103] typically used by Parliament to shore up a statutory scheme or class of administrative decisions of questionable

[103] See also, eg, the:
- *Fisheries Rules (Validation) Act 1997* (Tas)
- *Land Use Planning and Approvals Amendment (Validation) Act 2009* (Tas)
- *Living Marine Resources Management (Validation of Documents) Act 2002* (Tas)
- *Meander Dam Project Act 2003* (Tas)
- *Pulp Mill Assessment Amendment (Clarification) Act 2009* (Tas)
- *State Coastal Policy Validation Act 2003* (Tas)
- *State Policies and Projects (Validation of Actions) Act 2001* (Tas).

validity, and sometimes to pre-empt or override a challenge to them in a court or tribunal.[104]

4.5 RFA Exceptionalism and FPST Exemptions Compared

The Tasmanian forest practices system's immunities explained above parallel the federal regime of RFA exceptionalism. Under both regimes, forestry enjoys exemptions from key components of their respective jurisdiction's planning, heritage, threatened species protection and other environmental law.

Since the omnibus EPBC Act replaced a suite of prior Commonwealth environmental statutes, the execution of RFA exceptionalism (as explained in Chapter 3) is a simpler drafting exercise than required in Tasmania where the RMPST comprises a range of statutes. Drafters of the FPST exemptions have responded to this challenge:

- firstly, by excluding forestry practices from some specific elements of the RMPST; and

- secondly, enabling the Minister responsible for forestry to prescribe by regulation provisions of statutes from which forestry operations are thereupon exempted.

This grants excessively wide powers for the Minister to exempt forestry from statute law, thereby undermining environmental regulation of the industry.

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[104] See, eg, the *Meander Dam Project Act 2003* (Tas) which, inter alia:
- overrode the rejection of the Meander Dam by Tasmania's Resource Management and Planning Appeal Tribunal;
- ruled out any review or appeal of the dam under any Tasmanian law; and
- prevailed over any other Tasmanian law.

The *Pulp Mill Assessment Act 2007* (Tas) contains a similar ouster clause in its s 11, discussed in Chapter 7.

The SOFR statement that RFAs provide equivalent environmental protection to the EPBC Act cannot therefore be based on State planning or environmental law. Key matters of national environmental significance (eg threatened species) abandoned by the EPBC Act (given its RFA exemptions) are not protected by their relevant State statute (see 4.4.2). So they are left reliant on the TRFA. Off-reserve, the TRFA delivers little by way of binding environmental protection, depending for practical purposes on the Tasmanian forest practices system.

Another similarity between the FPST and RFA regimes lies in the motivations for their establishment. Wettenhall, quoted above, referred to 1940s efforts to take forestry out of politics,[105] which proved overly optimistic. Depoliticising forestry has also been a hope of proponents of the later FPST and RFAs. Hence, recall that establishment of the RFA regime was also, as Chapter 3 explained, in part an effort to take forestry out of politics – particularly the log truck convoy PM Keating faced in Canberra. The RFA regime has failed at depoliticisation, particularly in Tasmania. As Prof Jamie Kirkpatrick foreshadowed it would, the RFA regime has failed: 'to ensure a quiet future for the forest industries and the politicians who support them'.[106] To some extent, the blame for this lies in the RFA model of inter-governmental agreements, backing industry but in the face of strident opposition from vocal sections of the community. Freezing out third party appeals and the like (as do both the RFA and FPST regimes) may be effective legally, but causes opponents to pursue other avenues, such as market-based campaigns.

[105] Wettenhall, above n 32, 243.
[106] Jamie B Kirkpatrick, 'Nature Conservation and the Regional Forest Agreement Process' (1998) 5(March) *Australian Journal of Environmental Management* 31, 36.

4.6 Problems with the FPST and TRFA Reliance on it

A particular problem in the TRFA's reliance on the FPST is the latter's explicit 'delegated and decentralised approvals' [107] design of 'cascading' delegations, explained below. The claim of environmental protection equivalent to that of the EPBC Act renders each link in the FPST 'chain of command' crucial to meeting Australia's international environmental obligations in Tasmanian forests.

4.6.1 Cascading Delegations in the FPST to the Chain's End

RFA exceptionalism prevents the EPBC Act being an effective tool to protect MNES from forestry impacts. This leaves State law, where (at least in Tasmania) a parallel regime to RFA exceptionalism exists, exempting forestry from most of Tasmania's environmental and planning law (the RMPST).

The systemic problem discussed earlier of cascading delegations down through multiple instruments in the FPST can now be extended upwards throughout the RFA regime, upon which Australia's implementation of international obligations with respect to forestry depend. This is demonstrated in the following flow chart summary (key instruments, etc in **bold**).

1. Australian fulfilment of ***pacta sunt servanda***, a fundamental norm of international law (codified in the **VCLT**) requires Australia to fulfil its **treaty obligations** in good faith.

2. Many key MEAs are implemented in Australian domestic law by the EPBC Act. However, RFA exceptionalism exempts from the EPBC Act:

[107] FPST objective (c) explained at 4.2.3 above.

- RFA forestry;[108] and

- forestry operations in RFA regions where no RFA is in force (eg Queensland).[109]

3. Federal law in respect of RFA forestry is governed by the **RFA Act**. The RFA Act inhibits the Commonwealth (through RFA Act s 8 compensation requirements) from undermining (eg by expanding reserves) the forestry industry's resource security as enshrined in RFAs.

4. In Tasmania, all of which is an RFA region, this leaves the Australian Government relying on the **TRFA.** :

5. The TRFA depends, on two elements:

5.1 the CAR Reserve System; and

5.2 outside the Reserve System, in 'production' forests, State law.

6. Under Tasmanian law, forest practices are largely exempt from the Resource Management and Planning System (RMPS), leaving them regulated by only the **Forest Practices System of Tasmania (FPST)**.

7. The FPST is made under the ***Forest Practices Act 1985*** **(Tas),** s 30 of which enables the making of:

7.1 the ***Forest Practices Code*** by the Forest Practices Authority.

7.1.1 The Code enables the making of **forest practices plans**. These can be drafted by the **owner** of land (or their agent) as **proponent**

[108] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38; *Regional Forest Agreements Act 2002* (Cth) s 6(4).
[109] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40.

seeking to carry out a forestry operation. **Forest practices plans** then require certification by a **forest practices officer**, acting as agent for the Forest Practices Authority.

7.1.2 However, **forest practices officers** are 'generally employees of the larger landowners, or consultants employed by smaller landowners'.[110] Their work has likely included preparing the plan, which they then certify.

7.1.3 The **proponent** (who generally employs the **forest practices officer)** must comply with the certified forest practices plan in carrying out their forestry operations.

Figure 4.1 – Cascading Delegations in Tasmanian Forestry Regulation

Evidence of the conflict inherent in step 7.1.2 is summarised below.

4.6.2 Conflicted Forest Practices Officers

The employment of forest practices officers (particularly as employees, eg by large forestry landowners) provides a systemic conflict of interest when forest practices officers prepare and certify their employer's forest practices plan, and subsequently lodge compliance certificates after their employer's forestry operations. Random audits on some 15% of forest practices plans occur annually by the Authority's staff or consultants.[111] However, in 2003, one of the two employees of the Forest Practices Board (predecessor to the Forest Practices Authority) with authority to audit forestry operations gave evidence that, inter alia, such audits did not overcome the inherent

[110] Constance McDermott, Benjamin Cashore and Peter Kanowski, 'A Global Comparison of Forest Practice Policies Using Tasmania as a Constant Case' (GISF Research Paper 010, Global Institute of Sustainable Forestry, Yale University, March 2007) <http://www.fpa.tas.gov.au/__data/assets/pdf_file/0004/58810/GISF_Research_Paper_010.pdf>, 45.
[111] Ibid.

conflicts of employee forest practices officers. The forester of 32 years, Bill Manning, was subpoenaed to give evidence to a Senate Rural and Regional Affairs Committee. He told the Committee there were more than 150 forest practices officers in Tasmania, but virtually all these officers worked for the forest industry.[112] As (conservative) NSW Liberal Senator Bill Heffernan responded:

> I would have thought it was blindingly bloody obvious that if you do not have independence of means, you certainly are not going to have independence of mind.[113]

Thus, the industry employment of most forest practise officers provides a conflict of interest and lack of independence in their key duties. FPOs dual roles saves them from needing to choose a side (even temporarily) of the so-called 'revolving door'[114] between employment by industry regulatee and the regulator. This is a recipe for regulatory capture.[115]

4.6.3 Co-Regulation Operating in Practice as Self-Regulation

On paper, the FPST appears a system of *co-regulation*, involving industry and notionally independent agencies such as the FPA. However, as noted at 4.2.2, Prof Fisher identified the system as based on *self-regulation*.[116] Some problems inherent in such a system were evident in practice according to Bill Manning's evidence. He told the Senate Committee, inter alia:

- the *wood chip industry had come to dominate so strongly that regulators were now rubber stamps*; and

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[112] Andrew Darby, 'It's a Free-For-All For Logger', *The Age* (online), 18 October 2003 <http://www.theage.com.au/articles/2003/10/17/1066364486654.html>.
[113] Ibid.
[114] Toni Makkai and John Braithwaite, 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' (1992) 12 *Journal of Public Policy* 61.
[115] Ibid.
[116] Fisher, above n 36.

- the [forest practices] system allowed the *industry to regulate itself*.[117]

Thus, self-regulation seems the more accurate characterisation given the conflicted roles of industry-employed forest practices officers (albeit acting as agents for the FPA), and the system Mr Manning explained (extending at least to enforcement by the FPA's predecessor).

While self-regulation has the 'virtues of being non-coercive, unintrusive and (in most cases) cost-effective,' it also has 'low reliability when used in isolation.'[118] Its 'success also depends heavily on the extent of the gap between the public and private interest.'[119] In forestry, there is often a large gap (or even, direct conflict) between:

- the public interest in environmental protection (typically pursued off-reserve by imposing management prescriptions restricting the parameters of forestry operations); and

- the private interest in minimising (restrictive) management prescriptions, so that coupes can be harvested most profitably.

In these circumstances, self-regulation is a far from robust regulatory mechanism. If it fails at the level of forest practices officers, then it is far from clear that the FPST contains sufficiently robust safeguards to maintain the integrity and effectiveness of the system.

A subsequent (not necessarily related) study commissioned by the Forest and Forest Industry Council of Tasmania compared the written policies (rather than implementation) of the FPST with environmental forest practice policies of thirty-

[117] Darby**,** above n 112.
[118] Gunningham and Sinclair, above n 39, 4.
[119] Ibid 4.

eight other jurisdictions across twenty-eight countries.[120] As the study's focus was on written policies rather than implementation, it made 'no attempt to link policy approach with environmental impact', so sought to inform, not resolve, forestry debate.[121] The study found, inter alia, the FPST's forest practice policies to be equally *prescriptive* to its western Canadian case studies, California and the forests managed by the US Forest Service, these ranking as more prescriptive than other OECD countries.[122] Tasmanian forest practice performance thresholds also most closely resembled the study's Canadian and western US case studies, though were 'generally less restrictive than those of the US Forest Service...' and developing countries 'where paradoxically, government enforcement capacity is lowest'.[123] Overall, within the limits of its parameters, the study found Tasmanian forest practice policies to be among the 3 (private land) to 5 (public land) most consistently prescriptive policies of its case studies.[124]

While the above study considered prescriptiveness a positive attribute, Gunningham and Sinclair noted that often:

> industry self-regulation is higher in terms of its prescriptiveness than its coercion. That is, firms may be required to address specific issues and adopt certain behaviours, but there is little by way of external enforcement to ensure that their obligations are met.[125]

This Gunningham and Sinclair generalisation applies to the FPST which, while prescriptive, lacks sufficient coercion / 'external enforcement to ensure that their obligations are met'.[126] The FPST's self-regulatory approach renders enforcement

[120] McDermott, Cashore and Kanowski, above n 110.
[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Ibid 6.
[125] Gunningham and Sinclair, above n 37, 5.
[126] Ibid.

more internal than external, and Mr Manning's evidence suggested it does little to ensure compliance with obligations.

One of Gunningham and Sinclair's regulatory design principles is to 'Prefer less interventionist measures',[127] for various reasons, but providing that 'the measure *actually works*.'[128] Again, this, suggests that prescriptiveness is not the be all and end all of regulation (particularly if the prescriptions are inadequately enforced: effectiveness and outcomes are ultimately more important. However, Mr Manning's evidence suggested that under-enforcement of the FPST greatly hindered its delivery of environmental outcomes, as explained below.

4.6.4 FPST Under-Enforcement and Whistle-Blower Ostracism

While the FPST includes enforcement mechanisms, which on paper compare favourably with other forestry jurisdictions,[129] Bill Manning's evidence was that his efforts to discharge his statutory enforcement duties were actively thwarted:

- As auditor he found nearly 100 breaches of the Forest Practices Act, but despite that Forestry Tasmania had never been prosecuted.
- Eventually Mr Manning did issue a ticket over a new plantation site. He was accused of being heavy-handed and the notice was over-ridden.
- When he finally tried to prosecute Forestry Tasmania, his charge books were taken from him. He was shifted elsewhere in the public service.[130]

Redeployment is a common treatment of whistle-blowers, also experienced by agitators such as John Sinclair of the Fraser Island Defence Organisation (FIDO),[131]

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[127] Ibid.
[128] Ibid 5-6.
[129] McDermott, Cashore and Kanowski, above n 110, 45-6.
[130] Darby, above n 112.

noted in Chapter 2. At least Tasmania's *Public Interest Disclosures Act 2002* (Tas) and *Integrity Commission Act 2009* (Tas) now provide improved legal protection for whistle-blowers.[132]

Nevertheless, Mr Manning's experience and seniority as one of the two officers then *auditing* forestry practices for the regulator, suggests that only a brave and persistent forest practices officer would successfully bring enforcement action, even if minded to do so against their employer, let alone complain publicly.

4.6.5 Regulatory Capture in a Culture of 'Cronyism' or 'Cosiness'

Bill Manning's evidence above of under-enforcement and his efforts to prosecute Forestry Tasmania being thwarted was consistent with regulatory capture, at least of enforcement within the FPA's predecessor. For example, in their examination of regulatory capture of Queensland environmental protection laws, Briody and Prenzler[133] cite Grabosky and Braithwaite's book which concluded of environmental prosecutorial culture that 'despite wide variation across Australia in policies relating to prosecution, environmental regulators invariably seek co-operative relationships with industry'.[134] While prosecutions can be resource intensive, their absence to the extent Manning described removes the 'big stick' deterrent which White and Heckenberg observed as essential.[135]

Bill Manning further alleged systemic flaws, inter alia:

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[131] Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law* (Federation Press, 1993) 2.
[132] Interestingly, at the time of writing, the Integrity Commission's inaugural former CEO is suing the Tasmanian Government claiming unfair dismissal.
[133] Michael Briody and Tim Prenzler, 'The Enforcement of Environmental Protection Laws in Queensland: A Case of Regulatory Capture?' (1998) 15(1) *Environmental and Planning Law Journal* 54.
[134] Ibid citing Peter Grabosky and John Braithwaite, *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (Oxford University Press, 1986).
[135] Rob White and Diane Heckenberg, 'Environmental Harm is a Crime', July 2012, Briefing Paper No. 6, School of Sociology and Social Work, University of Tasmania 41.

- The wood chip industry's domination meant clearfelling had ravaging effects.
- The system starved the Forest Practices Board of information in a culture of 'cronyism, intimidation and deception'.[136]

Tasmania is a small State, prone to cronyism or what (a supervisor of this thesis) Michael Stokes has more politely characterised as a 'culture of cosiness'.[137] While not unique to small island States such as Tasmania, the condition seems particularly concentrated (t)here. It suggests something lesser than the overt corruption of the 1940s, or Edmund Rouse's attempted political bribery to keep the Gray government in power in 1989.[138] Rather it suggests interlocking public and private sector directorships and similar interconnections beyond the boardroom and Parliament. If not properly managed, these raise risks of potential conflicts of interest, regulatory capture,[139] and other significantly suboptimal governance.

Given that, and the other shortcomings of the FPST identified in this thesis, the studies that benchmarked the FPST favourably against forest practice policies of other jurisdictions (a worthwhile comparison of like with like), may indicate mainly that globally, forestry governance needs improvement. That is a worthwhile area for further research.

4.6.6 Environmental Outcomes and TRFA Role

The comparative study commissioned by the Forest and Forest Industry Council of Tasmania suggested the comparative effectiveness of Tasmania's policy approach in

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[136] Darby, above n 112.
[137] Michael Stokes, Senior Lecturer, Faculty of Law, University of Tasmania, interview, 'Life Matters', ABC Radio National, 27 August 2008 <http://www.abc.net.au/rn/lifematters/stories/2008/2343694.htm>.
[138] Noted at 4.2.1.
[139] See eg Briody and Prenzler, above n .133

achieving environmental outcomes as a subject for further research.[140] This thesis focuses on the law, but will contribute to comparing the RFA Act and FPST legal framework with relevant environmental law, including international obligations. Bill Manning's evidence in respect of environmental outcomes and the Tasmanian Regional Forests Agreement was blunt, including:

- In his time as auditor, Mr Manning found more than 80 breaches of fauna protection provisions: 'These are meant to protect the unique creatures of Tasmania's forests - the giant freshwater crayfish, wedge-tailed eagles, the spotted tail quoll.'[141]
- Although he reported dozens of breaches of laws, including those protecting endangered species, no action was taken.[142]
- He condemned the Tasmanian RFA's role over its first 5 years: 'In the last five years I have witnessed the most appalling deterioration in management of Tasmania's forests, especially state-owned forests.'[143]
- That dramatic management decline under the Tasmanian RFA and the national 2020 Vision for plantation growth saw drastic forestry impacts on native forests and species:

> If the intent of the RFA and the 2020 Vision was to oversee the widespread destruction of native forests, and the attendant unique flora and fauna by an unsupervised and negligent industry, then it has succeeded.[144]

[140] McDermott, Cashore and Kanowski, above n 110, 6.
[141] Darby, above n 112.
[142] Ibid.
[143] Ibid.
[144] Ibid.

4.6.7 Tasmanian Government Response to Manning's Evidence

The industry and official Tasmanian Government response to Mr Manning's detailed and controversial evidence was under-whelming. In particular, then Forestry Minister Lennon and Forestry Tasmania's managing director initially refused to appear on ABCTV's flagship Tasmanian current affairs program.[145] They then dismissed Mr Manning's allegations, but refused media requests for a detailed response:

> The Forest Industries Association of Tasmania defended the system of co-regulation by which the industry employed its own forest practices officers under audit.
>
> "These are good men doing a job to the best of their ability," said association chief executive Terry Edwards.
>
> Deputy Premier Paul Lennon said Mr Manning's allegations were sensationalist.
>
> Forestry Tasmania's managing director Evan Rolley said they were outrageous. *No detailed response was available from the agency or the minister.*[146]

The current FPA is more independent than its predecessor Board which employed Mr Manning (board members of which included employees of the State-owned forestry corporation which the Forest Practices Board was supposed to regulate). However, the FPST still embodies (including in its legislation) many of the key underlying drivers identified as problematic by Mr Manning, such as self-regulation – as explained earlier in this chapter at 4.2.2 and 4.6.3. This suggests that greater federal oversight is needed, as is argued below.

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[145] Senator Shayne Murphy, interview with Judy Tierney, Stateline Tasmania, ABCTV, 10 October 2003 <http://www.abc.net.au/stateline/tas/content/2003/s964616.htm>.
[146] Darby, above n 112 (emphasis added).

4.7 Conclusion: Problems with RFA Reliance on State Law

As set out in this chapter's introduction, RFA exceptionalism carves out forestry from the EPBC Act, thereby leaving regulation of forestry's environmental impacts largely to State law. This chapter demonstrates that Tasmanian law itself excludes forestry practices from the RMPST,[147] and potentially much other Tasmanian law,[148] thereby paralleling RFA exceptionalism.[149]

Therefore, environmental regulation of Tasmanian forestry turns on the effectiveness of the FPST, the objectives of which[150] are far less environmentally focused than those of the RMPST.[151] The FPST, being based on a chain of cascading delegations of authority, depends for its effectiveness on each stage of the process (or link in the chain) being undertaken accurately and with integrity.[152] If any of the persons delegated authority down the 'chain of command' fail to carry out their functions properly and adequately, then the integrity of the system is compromised.

This is problematic, particularly where the 'on-ground' cause (a forestry operation) of potential environmental harm is:

- so far removed from the chain's start where the Australian Government can exercise direct influence; and
- depends for regulation on FPOs conflicted[153] by being 'generally employees of the larger landowners, or consultants employed by smaller landowners'.[154]

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[147] See 4.4.1.
[148] See 4.4.2-4.4.4
[149] See 4.5.
[150] See 4.2.
[151] See 4.3.
[152] See 4.6.1.
[153] See 4.6.2.
[154] McDermott, Cashore and Kanowski, above n 110, 45.

There is consequently a long length of chain, containing many intermediate steps (ie a huge disconnect) between potential cause and international law effect, ie between:

- a forestry operation regulated 'on the ground' by FPOs; and
- the Australian Government which owes direct responsibility for Australia's international obligations.

Rendering Australia's compliance with its international obligations dependent on such a system, with its cascading delegations comprises, at best, a regulatory system inadequate to *ensure* Australia meets its international obligations. At worst, it is a recipe for repeated breaches, of which there is past evidence in Tasmania.[155]

4.7.1 Reform Recommendations

The Chapter has demonstrated regulatory capture applicable to the FPST, at the very least on the face of its legislation, and potentially in practice unless FPA workplace culture has changed dramatically since Bill Manning's departure. To respond to regulatory capture, Briody and Prenzler:

- argue for a 'determined approach to law enforcement' as a means of increasing compliance;[156] and
- note that '[t]he utility of the enforcement threat can be enhanced by citizen access to the enforcement process'.[157]

The objectives of the FPST and the history of Tasmanian forestry enforcement (or in Bill Manning's extensive experience, lack thereof) is not conducive to the former, while its multiple exemptions from RMPST environment and planning legislation

[155] See, eg, the evidence of Bill Manning at 4.6.2 and following.
[156] Briody and Prenzler, above n 133, 56.
[157] Ibid.

largely preclude the latter. Both warrant reform in Tasmania, but there is no immediate prospect of that.

Hence, the easiest and most reliable way for the Commonwealth to address this flaw would be to remove the RFA exemptions from the EPBC Act, enabling the Australian Government to directly regulate those forestry operations which significantly impact on MNES, rather than rely on the current extended chain of the FPST. This would provide a federal regulatory backstop or safety net enabling the Australian Government's Environment Minister to catch (by regulating or refusing) high impact (on MNES) forestry operations. There is no guarantee that the federal Minster would necessarily regulate these more robustly than the FPST. However, if not, another key advantage of the EPBC Act over the RFA and FPST is the EPBC Act's provision for third party enforcement, noted in Chapter 2 and detailed in Chapter 6.

This would open the way for sufficiently motivated third parties (eg ENGOs) to use civil litigation to enforce application of the EPBC Act to excessive, high impact logging if governments were not. Enabling third party 'surrogate' regulators to provide an extra safety net (or third face of the Braithewaite – Gunningham regulatory pyramid) is consistent with the regulatory mix Prof Gunningham generally encourages. In particular, such a 'third way' seems well-suited to overcoming risks of regulatory capture where (given its overly close association of business and government), neither self-regulation nor government enforcement should be relied upon.

Hence, to the extent that the legal regimes of the RFA Act (eg through RFA exceptionalism) and FPST (eg in its dependence on self-regulation), run the risk, or exhibit symptoms of regulatory capture, repealing RFA exceptionalism is a justified and well-adapted legislative response.

Chapter 5 World Heritage and the Tasmanian Wilderness World Heritage Area

> Forests declared as national parks … can be stripped of these protections … Because government cannot be trusted to protect even those areas identified as the common heritage of mankind, conservationists are destined to fight again and again for places they believe worth keeping.[1]

5.1 Introduction

In July 1983, the High Court handed down its landmark judgment in *Commonwealth v Tasmania*.[2] Consequently, the Franklin River continues to flow free, past ancient Aboriginal caves and through the heart of the Tasmanian Wilderness World Heritage Area ('TWWHA'). For the next two decades, logging in forests outside the TWWHA boundary formed the focus of Tasmania's forestry conflict. The TWWHA was expanded in 1989 and again in June 2013. The Abbott Government's attempt to excise from the TWWHA substantial tracts of 2013 extension forests, to enable logging in them, demonstrates Professor Bonyhady's foresight.

As Chapter 2 explained, the EPBC Act rewrote Australian national environmental law. The Act, inter alia, implements in Australian law a number of treaties, including the *World Heritage Convention* (WHC). This chapter examines key EPBC Act provisions applying to the TWWHA and how RFA exceptionalism impacts Australia's World Heritage obligations.[3]

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[1] Tim Bonyhady, *Places Worth Keeping: Conservationists, Politics and Law* (Federation Press, 1993), 146.
[2] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').
[3] This chapter draws in part upon Tom Baxter, 'The Tasmanian Wilderness World Heritage Area: Protected by the *Environment Protection and Biodiversity Conservation Act 1999*?' (2008) 1(1 & 2)

In this context, the provisions of the EPBC Act regarding RFA forestry operations are a concern, mitigated in part by EPBC Act s 42. It applies the EPBC Act to forestry operations inside a property on the World Heritage List, but not to forests meeting the World Heritage test (of outstanding universal value) if they are not yet listed (or, if they are delisted).

5.1.1 Chapter Overview

On 1 July 1983, the High Court of Australia delivered its much-anticipated decision in the *Tasmanian Dam Case*,[4] upholding by the narrowest of majorities the Commonwealth's right to stop Tasmania damming the Franklin River. Consequently, the river and its Aboriginal caves, such as the famous Kuta Kina, escaped submersion.

Further World Heritage cases followed, demonstrating the considerable extent of the legislative power vested in the Commonwealth through the external affairs power.[5] Publicly funded construction of inappropriate dams still continues in Tasmania[6] and other States such as Queensland, generating not only hydro-electric power or

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Journal of the Australasian Law Teachers Association 109 <http://www.alta.edu.au/JALTA%20Individual%20Papers.htm#Environmental%20Law>. For legal reference to recent developments in relation to the TWWHA and forestry, see:
Tom Baxter, 'Logging World Heritage Listed Forests: Unlawful and Uneconomic' (2013) (3) *National Environmental Law Review* 55 <http://www.pams.com.au/demo/StaticContent/Images/NELA/NELR_2013_Issue_3.pdf>;
Tom Baxter, 'New Danger for Australian World Heritage Wilderness' (2013) *The Conversation* <http://theconversation.com/new-danger-for-australian-world-heritage-wilderness-18077>;
Tom Baxter, 'Australia Going Backwards on World Heritage Listed Forests' (2013) *The Conversation* < http://theconversation.com/australia-going-backwards-on-world-heritage-listed-forests-21423>; and
Tom Baxter, 'Whither Forests of the Tasmanian Wilderness World Heritage Area?' *Australian Environment Review* (2014) 29(4), 112 <http://ecite.utas.edu.au/92413> (the latter covering some developments subsequent to the thesis' original submission).

[4] (1983) 158 CLR 1.

[5] *Richardson v Forestry Commission* (1988) 164 CLR 261 ('*Tasmanian Forests Case*'); *Queensland v Commonwealth* (1989) 167 CLR 232 ('*Wet Tropics Case*').

[6] See, eg, the *Meander Dam Project Act 2003* (Tas) which, inter alia: overrode the rejection of the Meander Dam by Tasmania's Resource Management and Planning Appeal Tribunal; ruled out any review or appeal of the dam under any Tasmanian law; and prevailed over any other Tasmanian law.

irrigation, but also environmental management challenges and, in Queensland particularly, EPBC Act litigation.[7] In today's Tasmania, however, the most controversial industry is forestry and its most controversial logging over recent years has been that adjacent to the TWWHA.

The next part of this chapter considers the primary obligations under the *Convention Concerning the Protection of the World Cultural and Natural Heritage*.[8] Then section 5.3 below examines Australia's domestic implementation of the Convention, including the High Court cases regarding the TWWHA, in section 5.3.3. These cases strongly confirmed the Commonwealth's ability to implement the Convention pursuant to its external affairs power. Section 5.4 examines how, and the extent to which, this implementation is now done through the EPBC Act. Section 5.6.2 considers how RFA exceptionalism (in particular, EPBC Act s 42) applies to RFA forestry operations significantly impacting World Heritage values. Section 5.7 examines a case study of the potential impacts of the RFA exemptions on the TWWHA. It is argued that these exemptions undermine the Commonwealth's international responsibility, and hard won Constitutional capacity, to protect those parts of Australia's natural and cultural heritage (in the *World Heritage Convention* sense) threatened by forestry operations.

5.2 World Heritage Convention Obligations

The key articles of the *World Heritage Convention* most relevantly imposing obligations and linking its international processes to the TWWHA and Tasmanian forestry are briefly described below. It is a strongly worded treaty imposing particularly onerous protective obligations on well-resourced nations such as

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[7] Jacqueline Peel and Lee Godden, 'Australian Environmental Management: a 'Dams' Story' (2005) 28(3) *University of NSW Law Journal* 668.

[8] *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*').

Australia. Though not detailed here, the World Heritage Committee has published *Operational Guidelines*[9] to guide the application of the Convention's text.

5.2.1 Primary Obligations under the Convention – Articles 4 and 5

As the *World Heritage Convention* Preamble notes, 'deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world'.[10]

Therefore, the *World Heritage Convention,* art 4, imposes a duty on each State Party to 'do all it can, to the utmost of its own resources to ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated within its territory.'[11] Australia is a rich nation, well-endowed with financial and human resources (and expertise) to manage its

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[9] World Heritage Committee, *Operational Guidelines for the Implementation of the World Heritage Convention* <http://whc.unesco.org/en/guidelines/>.

[10] Ibid 1.

[11] Ibid art 4. Articles 1-2 define 'cultural heritage' and 'natural heritage' as follows:

> **Article 1**
>
> For the purposes of this Convention, the following shall be considered as "cultural heritage":
>
> monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
>
> groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;
>
> sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.
>
> **Article 2**
>
> For the purposes of this Convention, the following shall be considered as "natural heritage":
>
> natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
>
> geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
>
> natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

protected areas. Accordingly, art 4 places particularly onerous obligations on Australia: it 'can' – and hence, must, do much.

In addition, art 5 provides:

> To ensure that effective and active measures are taken for the protection, conservation and preservation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country … to take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage.[12]

The Convention definitions of 'cultural heritage' and 'natural heritage' require that they be of outstanding universal value from specified points of view (for which there are specified criteria), but do not limit them to World Heritage *listed* items or places.[13] Thus, 'cultural heritage' and 'natural heritage' activate art 4-5 obligations even before they are World Heritage listed.

5.2.2 The World Heritage List

The *World Heritage Convention* provides for the World Heritage Committee[14] to establish, keep up to date and publish a 'World Heritage List', being 'a list of properties forming part of the cultural heritage and natural heritage, as defined in

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[12] *World Heritage Convention*, opened for signature 23 November 1972, 1037 UNTS 151, art 5 (entered into force 15 December 1975).
[13] Ibid arts 1-2.
[14] Ibid art 8, which provides for establishment of an Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage ('the World Heritage Committee') made up of 21 of the State parties to the Convention. Countries are elected to the Committee for terms of approximately three years. The Committee's role includes deciding if a property is to be added to the World Heritage List.

Articles 1 and 2 of this Convention, which [the Committee considers have] outstanding universal values in terms of such criteria as it shall have established.'[15]

5.2.3 Nomination of Properties to the World Heritage List

A property may only be included in the World Heritage List if the national government of the country where the property is located submits a nomination to the World Heritage Committee recommending that the property be listed. However, the *World Heritage Convention* requires each State Party, '*in so far as possible*, [to] submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage, situated in its territory and suitable for inclusion in the [World Heritage List].'[16]

The final decision as to whether a nominated property is inscribed on the list rests with the World Heritage Committee. Similarly, once listed, only the Committee can excise a property (or part thereof) from the World Heritage List (see 5.7.3 below).

5.3 Australian World Heritage Convention Implementation pre-EPBC Act

Chapter 2 (section 2.4) summarised the impact on Australian national politics and law of environmental disputation, culminating in passage of the EPBC Act. The following section explains the Tasmanian context leading to establishment of the TWWHA. Many Tasmanian disputes became national and were influential (especially the 1980s World Heritage cases) as foundations for contemporary Australian environmental law. So there is some overlap between the events the two chapters cover – but that occurs through the chapters' different lenses.

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[15] Ibid art 11(2).
[16] Ibid art 11(1) (emphasis added).

5.3.1 Tasmanian World Heritage Context: Crucible of Conflict

Tasmania's 'terrible beauty'[17] sets the island's gothic wilderness against a crucible of conflict born of a dark colonial and penal history. UNESCO described south west Tasmania as 'a unique wilderness of incomparable significance and value.'[18] Given it contains evidence of Aboriginal occupation over millennia, 'cultural landscape' would be a more apt descriptor (its buttongrass plains being in part the product of traditional burning or, in words of the *World Heritage Convention*,[19] 'the combined works of nature and man'). Today, competing contemporary values, narratives and discourses revolve around wilderness and the impacts of resource extraction. Environmental conflicts since the damming of Lake Pedder (being flooded as the *World Heritage Convention* opened for signature, summarised below) and various wild rivers (see 5.3.2 below), through to industrial-scale clearfelling and export woodchipping (see 5.3.3 below), have provided much 'grist for political dispute'.[20]

The Hydro-Electric Commission (HEC) was a State-owned monopoly responsible for Tasmanian electricity generation, transmission and retail, and for forecasting power demand upon which its dam-building was based. Under the bipartisan Tasmanian Government policy of hydro-industrialisation, the HEC's empire expanded.[21] This saw various wild rivers dammed to generate hydro-electricity, mostly sold in cheap bulk contracts to heavy industry.[22]

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[17] Richard Flanagan, *A Terrible Beauty : History of the Gordon River Country* (Greenhouse, 1985)
[18] Kevin Kiernan, 'I Saw My Temple Ransacked' in Cassandra Pybus and Richard Flanagan (ed), *The Rest of the World is Watching* (Pan McMillan, 1986) 20, 26.
[19] *World Heritage Convention*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).
[20] John S Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford University Press, 2nd ed, 2005), quoted in Chapter 1. For an account of Tasmania's environmental disputes, see Greg Buckman, *Tasmania's Wilderness Battles: A History* (Allen & Unwin, 2008).
[21] Tasmanian Liberal leader Angus Bethune described the HEC as a 'state within a state': Buckman, above n 20, 23, citing Les Southwell, *The Mountains of Paradise*, 17.
[22] Buckman, above n 20.

The most famous flooding was of Lake Pedder, a unique, picturesque alpine lake with magnificent beach (which served as a landing strip for light aircraft), and a Mecca for bushwalkers. HEC dams expanding the catchment for the Lake Gordon power station flooded the lake. However, the conservation campaign to save it gave rise to a nascent modern environmental movement in Tasmania. Recognising the limits of their outside influence within the corridors of power, elements of the movement moved beyond lobbying and political protest to form the United Tasmania Group (UTG), the world's first 'green' political party[23] (established in May 1972, just two months before the Values Party in New Zealand).[24]

The apparently all-powerful HEC prevailed over conservationists and others including UNESCO. Newly-elected Labor Prime Minister Gough Whitlam declined conservationists' pleas to intervene, despite a resolution of his caucus calling for Tasmania to be offered financial compensation to save the lake.[25]

Many conservationists were understandably deeply dejected that their conscientious conservation campaign had proven powerless to prevent Lake Pedder's inundation.[26] However, from an environmental law perspective, the Pedder campaign has been credited[27] with leading to the enactment of the *Australian Heritage Commission Act 1975* (Cth) (creating the Register of the National Estate – see 5.3.3 below) and the *Environmental Protection (Impact of Proposals) Act 1975* (Cth) – see Chapter 2.

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[23] Kiernan, above n 18, 25.
[24] The NZ Values Party also arose out of a campaign against a hydro-electric scheme (on Lake Manapouri): Buckman, above n 20, 25.
[25] Buckman, above n 20, 31-2.
[26] Most powerfully see Kiernan, above n 18, 33. The conservation campaign also cost the lives of campaigner Brenda Hean and pilot Max Price en route from Hobart to Canberra (to skywrite over the national capital) in 1972. Their Tiger Moth aircraft disappeared in suspicious, still unsolved, circumstances, following threatened sabotage and an aircraft hangar break-in: see Scott Millwood, *Whatever Happened to Brenda Hean?* (Allen & Unwin, 2008)
[27] Bob Burton, 'Wilderness and Unreasonable People' in Cassandra Pybus and Richard Flanagan (ed), *The Rest of the World is Watching* (Pan McMillan, 1990) 79, 87.

5.3.2 Tasmanian World Heritage High Court Cases

Australia ratified the *World Heritage Convention* in 1974. When inscribed on the World Heritage List in 1982, the TWWHA met all four of the (then) criteria for natural heritage and three of the six criteria for cultural heritage. This represented the greatest number of World Heritage criteria satisfied by any listed property.

In 1979 the HEC publicly announced plans to dam the Gordon River below the Franklin River. This hydro-electric scheme would inundate the Franklin, a truly wild river. Unlike the picturesque and accessible Lake Pedder, the thundering Franklin was inaccessible to all but the most daring kayakers and rafters. Tasmanian Premier Robin Gray famously dismissed the spectacular river and its pure waters (albeit tea-coloured, derived from peat soil tannins) as a 'dirty brown, leech-ridden ditch'.

Given Lake Pedder's fate, strong State backing, and PM Malcom Fraser's refusal to intervene, chances of saving the Franklin River appeared remote. Nevertheless, conservationists overcame their Lake Pedder campaign fatigue and mustered their energy to make the river a subject of national and international concern.

As Chapter 2 foreshadowed, controversy over the HEC's scheme to dam the Franklin River contributed to the election of the Hawke Labor government, which had promised to stop the dam. The *World Heritage Properties Conservation Act 1983* (Cth) ('WHPC Act') was enacted, then unsuccessfully challenged by Tasmania. The 4-3 High Court decision[28] of 1 July 1983 was the first of a series of significant World Heritage cases[29] which represented 'some of the most contentious disputes in recent

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[28] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').
[29] *Tasmanian Forests Case* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232 ('Wet Tropics Case'). See also *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 77 FCR 153 (Northrop, Burchett and Hill JJ) (Full Court of the Federal Court) and the High Court's refusal of the applicant's special leave application: *Friends of Hinchinbrook Society Inc v Minister for Environment* [1998] 6 Leg Rep SL8a (Gaudron and McHugh JJ, 13 March 1998) ('*Port Hinchinbrook Case*').

Australian legal history.'[30] The cases[31] clearly established the right of the Commonwealth to implement treaty obligations under the external affairs power,[32] overriding recalcitrant States where necessary.[33]

The High Court's application of the WHC and interpretation of its provisions is also significant internationally in that the Court remains the only supreme judicial organ of any nation to undertake 'a detailed and extensive examination of the *World Heritage Convention*'.[34]

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[30] Lee Godden, 'Preserving Natural Heritage: Nature as Other' (1998) 22 *Melbourne University Law Review* 719, 733. For discussion of these cases see also, eg: Bates, Gerry, 'The Tasmanian Dam Case and its Significance in Environmental Law' (1984) 1 *Environmental and Planning Law Journal* 325; Ben Boer, 'World Heritage Disputes in Australia' (1992) 7 *Journal of Environmental Law and Litigation* 247; Tim Bonyhady (ed), *Environmental Protection and Legal Change* (Federation Press, 1992); Bonyhady, above n 44; Phillip Toyne, *The Reluctant Nation: Environmental Law and Politics in Australia* (ABC Books, 1994); Donald Rothwell and Ben Boer, 'The Influence of International Environmental Law on Australian Courts' (1998) 7 *Review of European Community and International Environmental Law* 31; Jacqueline Peel, 'Heritage of Humankind: A Call for Reform of World Heritage Protection and Management in Australia' (1998) 14 *Queensland University of Technology Law Journal* 220220; David Haigh, 'Hinchinbrook — In Defence of World Heritage' (1999) 6 *The Australasian Journal of Natural Resources Law and Policy* 47; Alison Cochrane, 'The Great Barrier Reef — World Heritage in Danger?' (1999) 4 *Asia Pacific Journal of Environmental Law* 251; Peel and Godden, above n 7; and numerous other articles in the *Environmental and Planning Law Journal*.

[31] See also, eg, outside the environmental context, cases such as: *Polyukovich v Commonwealth* (1991) 172 CLR 501; *Horta v Commonwealth* (1994) 181 CLR 183; *Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Act Case*').

[32] *Commonwealth of Australia Constitution Act 1900* (Cth) s 51(xxix).

[33] See James Crawford, 'The Constitution and the Environment' (1991) 13 *Sydney Law Review* 11; Sir Garfield Barwick, 'The External Affairs Power of the Commonwealth and the Protection of World Heritage' (1995) 25 *Western Australian Law Review* 233; Cheryl Saunders, 'The Constitutional Division of Powers with Respect to the Environment in Australia, Canada and the United States' in Kenneth M Holland, F L Morton and Brian Galligan (eds), *Federalism and the Environment: Environmental Policy Making in Australia* (Greenwood Press, 1996) 55; Richard Marlin, 'The External Affairs Power and Environmental Protection in Australia' (1996) 24 *Federal Law Review* 71; Rothwell and Boer, above n 30; and Communications Senate Environment, Information Technology and the Arts References Committee,, *Commonwealth Environment Powers* (Parliament of the Commonwealth of Australia, 1999).

[34] Lyndel V. Prott, 'UNESCO International Framework for the Protection of the Cultural Heritage' in James A.R. Nafziger and Ann M. Nicgorski (eds), *Cultural Heritage Issues: the Legacy of conquest, Colonization, and Commerce* (Koninklijke Brill NV, 2010) 257, 270-271. The author cites only the *Tasmanian Dams Case*, which is undoubtedly the most significant, although the subsequent *Tasmanian Forests Case* and *Wet Tropics Case* also involved the High Court applying the WHC.

The cases also had significant implications on the ground. For example, due to the *Tasmanian Dam Case*[35] the Franklin River flows free to this day.[36] Following the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* (Cth) and the High Court's ruling in the *Tasmanian Forests Case*[37] (see 5.6.2 below), the TWWHA was expanded in 1989.[38]

5.3.3 *Australian Heritage Commission Act 1975* (Cth) & National Estate

From the 1970s industrial-scale clearfell, burn and sow (CBS) forestry (more State-sponsored resource extraction, this led by the Forestry Commission) intensified in SE Australia, driven in large part by commencement of an export woodchip industry. By the early 1990s the small State of Tasmania was exporting more woodchips than the rest of the country combined (see annual pulpwood harvest by State in Figure 1.3 in Chapter 1).[39] Hence, after the *Tasmanian Dams Case*,[40] Tasmanian environmental focus turned from dams to forestry.[41]

The 1980s World Heritage disputes relied on the Australian Government to defend its protective legislation from challenge by the States. Subsequently, forestry operations in areas listed on the Register of the National Estate prompted ENGOs to

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[35] Ibid.
[36] Geoff Law, *The River Runs Free: Exploring and Defending Tasmania's Wilderness* (Penguin Group, 2008).
[37] *Tasmanian Forests Case* (1988) 164 CLR 261. See, eg, Ben Boer, 'Lemonthyme Inquiry Act Valid' (1988) 5 *Environmental and Planning Law Journal* 173; Martin Tsamenyi, Juliet Bedding and Lindi Wall, 'Determining the World Heritage Values of the Lemonthyme and Southern Forests: Lessons from the Helsham Inquiry' (1989) 6 *Environmental and Planning Law Journal* 232; ibid79.
[38] To contextualise such cases in wider Australian environmental discourse see eg Tim Bonyhady (ed), *Environmental Protection and Legal Change* (1992); Bonyhady, above n 1; Phillip Toyne, *The Reluctant Nation: Environmental Law and Politics in Australia* (1994).
[39] Burton, above n 27, 81.
[40] (1983) 158 CLR 1.
[41] Buckman, above n 20. Elsewhere in the nation dams remained a key contention: Peel and Godden, above n 7.

litigate using the *Australian Heritage Commission Act 1975* (Cth) s 30 to enforce federal EIA of such logging before granting federal export woodchip licences.[42]

As explained in Chapter 2, to the extent such litigation utilised the mechanism of Commonwealth export control laws, it drew on *Murphyores*[43] where the Australian Government had successfully used that power to end sand-mining on Fraser Island (later listed as a World Heritage property),[44]. Use of 'indirect triggers' such as export licences was removed by the EPBC Act which specifically excluded governmental authorisations from its definition of 'action'.[45] This undermined the government's enforcement regime by cutting he link between environmental legislation and one of the Commonwealth's major enforcement agencies, Customs.

Furthermore, as Chapter 3 explained, the RFA Act specifically exempted RFA wood, not only from EPBC Act Pt 3, but also from Australia's export control laws[46] and the *Australian Heritage Commission Act 1975* (Cth) (until the AHC Act was repealed). The latter's 30 requirements for consideration of prudent and feasible alternatives (an important part of EIA)[47] was excluded from the protections for national heritage instead inserted into the EPBC Act.[48]

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[42] *Australian Conservation Foundation Inc v Minister for Resources* (1989) 19 ALD 70; *North Coast Environment Council v Minister for Resources* (1994) 55 FCR 492; *Tasmanian Conservation Trust v Minister for Resources & Gunns Limited* (1995) 55 FCR 516; see Jan McDonald, 'Public Interest Environmental Litigation: Chipping Away Procedural Obstacles' (1995) 12 *Environmental and Planning Law Journal* 140.

[43] *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1

[44] Bonyhady, above n 1, discussed in Chapter 2.

[45] Things that are not an 'action' for the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)'s purposes include a 'decision by a government body to grant a governmental authorisation (however described) for another person to take an action': *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 524.

[46] *Regional Forest Agreements Act 2002* (Cth) s 6.

[47] See, eg, *Yates Security Services Pty Ltd v Keating* (1990) 98 ALR 68.

[48] The Hawke Review (discussed in the penultimate chapter of this thesis) recommended the such a' prudent and feasible alternative' test be added to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). It has long been a part of EIA in nations such as the US.

5.4 Application of the EPBC Act to World Heritage Properties

5.4.1 EPBC Act Applies Cooperative Federalism to World Heritage

As Chapter 2 chronicled, Australia's constitutional battles over World Heritage were won by the federal Hawke Labor government against conservative State governments. Roles were reversed during the decade of the Howard Government, which opted for an omnibus environmental statute heavily reliant on cooperative federalism (in contrast to that Government's approach to, say, industrial relations). The EPBC Act,[49] which replaced the WHPC Act and a suite of other Commonwealth environmental statutes, now governs Australian World Heritage properties.

A cooperative approach permeates the EPBC Act, even extending to matters of international agreement. For example, one object of the EPBC Act is 'to assist in the *co-operative* implementation of Australia's international environmental responsibilities' (*emphasis added*).[50] In the context of Australian World Heritage litigation, this represents a substantial departure from previous practice. The various cases fought under the WHCP Act demonstrated little by way of States' cooperation in 'implementation of Australia's international environmental responsibilities'. They make clear that World Heritage protection is a treaty obligation. Even in this area, however, the EPBC Act provides mechanisms for federal accreditation (eg, through bilateral agreements)[51] of State and Territory environmental assessment and decision-making processes.

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[49] The WHPC Act was repealed by the *Environment Reform (Consequential Provisions) Act 1999* (Cth) sch 6, item 1. Schedule 6, items 2-4, contain savings and transitional provisions. The *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*') is now implemented in Australian legislation through the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*').

[50] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) para 3(1)(e).

[51] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Ch 3: Bilateral Agreements. See specifically s 51: Agreements relating to declared World Heritage properties.

5.4.2 Nomination of World Heritage Properties via the EPBC Act

The EPBC Act, pt 15 div 1, imposes specific requirements on the Commonwealth government in relation to the nomination of World Heritage properties. Before a property is submitted to the World Heritage Committee for inclusion in the World Heritage List, the Commonwealth Environment Minister ('the Minister') must be satisfied that the Commonwealth has used its best endeavours to reach agreement on the proposed nomination and management arrangements for the property with:

> (1) the owners or occupiers of any land to be included in the proposed nomination; and
>
> (2) the relevant State or Territory.[52]

The Minister must notify various decisions regarding World Heritage nominations in the *Gazette*.[53]

5.4.3 A 'Declared World Heritage Property' under the Act

Under the EPBC Act, a property inscribed on the World Heritage List is automatically 'a *declared World Heritage property* as long as the property is included in the List'[54] (ie not if it is delisted, as the Liberal Party wants for TWWHA forest extensions listed in June 2013, see below at 5.6.2). Under s 14, the Minister also has the power to declare other properties where:

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[52] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 314. However, a failure to comply with s 314 does not affect submission of a property for inclusion in the World Heritage List or the status of a property as a declared World Heritage Property: s 314(3).
[53] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 315.
[54] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 13(1).

- the Commonwealth has nominated the property for inclusion on the World Heritage List, but the property has not yet been inscribed on the list;[55] or

- the property has not been nominated for World Heritage listing but the Minister believes that the property contains world heritage values and that some or all of those values are under threat.[56]

Before making a declaration under s 14, the Minister must give the appropriate State or Territory Minister a reasonable opportunity to comment.[57] However, if satisfied that the threat is imminent, the Minister is under no obligation to consult the State or Territory Minister.[58] A declaration under s 14 comes into force when it is published in the *Gazette*.[59]

Where the Minister makes a declaration under s 14 concerning a property that is not included on the World Heritage List, the declaration must specify the period for which the declaration will remain in force.[60] Where the Commonwealth has submitted a nomination in respect of the declared property to the World Heritage Committee, the Minister may specify the period that the Minister believes the Committee will need to decide whether or not to include the property in the World Heritage List.[61] If no nomination has been submitted, the Minister may only specify such a period as the Commonwealth needs to decide whether or not the property has world heritage values and to submit a nomination to the World Heritage Committee.[62] This period must not be longer than 12 months.[63]

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[55] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(1)(a).
[56] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(1)(b).
[57] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(2).
[58] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(3).
[59] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(5)(a).
[60] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(6).
[61] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(6)(a).
[62] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(6)(b).
[63] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(7).

A declaration relating to a nominated property must not specify the property after the Commonwealth has withdrawn the nomination.[64] A declaration in relation to a property that has not been nominated must be amended or revoked if the Minister has decided it does not have world heritage values or the values are not under threat.[65]

Section 14 is a valid exercise of Commonwealth power under the principles of the *Tasmanian Forests Case.*[66] However, stronger protection could be provided by adding a provision enabling extension, in appropriate circumstances, of the 12-month time limit imposed by s 14(7).

5.4.4 Meaning of 'World Heritage Values' under the Act

Under the EPBC Act, the world heritage values of a property are 'the natural heritage and cultural heritage contained in the property'.[67] The terms 'natural heritage' and 'cultural heritage' have the same meaning in the Act as in the *World Heritage Convention*.[68] The Australian Government's Environment Department has published a Values Table for each declared World Heritage property in Australia. The Values Table sets out an indicative list of the property's world heritage values, grouped under the *World Heritage Convention's* natural and/or cultural criteria for which the property was inscribed on the World Heritage List.[69] The Values Tables' lists of world heritage values are non-exhaustive since the EPBC Act's protections extend to all 'world heritage values' as that term is defined in the Act, even if not included in the Values Tables.

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[64] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 15(1).
[65] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 15(3).
[66] *Tasmanian Forests Case* (1988) 164 CLR 261. See above n 37 for articles discussing the case.
[67] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 12(3).
[68] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 12(4). In this respect, the Act retains the definitions of 'natural heritage' and 'cultural heritage' (see above n 11) that applied under s 3(1) of the WHCP Act, which also gave these terms the same meanings as in the *World Heritage Convention*.
[69] See, eg, Department of the Environment, Water, Heritage and the Arts, *Tasmanian Wilderness World Heritage Values* Australian Government <http://www.environment.gov.au/heritage/places/world/tasmanian-wilderness/values.html>.

5.4.5 Prohibited Actions Impacting Declared World Heritage Properties

The EPBC Act, in s 12(1), provides that a person must not take an action that:

a) has or will have a significant impact on the world heritage values of a declared World Heritage property; or

b) is likely to have a significant impact on the world heritage values of a declared world heritage property.

Maximum civil penalties for breaches of s 12(1) are about $550,000 for individuals and about $5,500,000 for corporations.

5.4.6 Offences Relating to Declared World Heritage Properties

Furthermore, the EPBC Act makes it an offence for a person to take an action that results in, or will result in,[70] or is likely to have,[71] a significant impact on the world heritage values of a declared World Heritage property. Criminal penalties for individuals breaching s 15A are imprisonment for up to seven years and/or a fine.

5.4.7 Defences

The Act provides that in the circumstances of the general defences described in Chapter 2, a person may lawfully take an action that has, will have, or is likely to have, a significant impact on the world heritage values of a declared World Heritage property, despite ss 12(1) and 15A. These circumstances include:

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[70] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s15A(1).
[71] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s15A(2).

- Where the person has obtained approval from the Commonwealth Environment Minister for the taking of the action.[72]

- Where the Minister has decided that the action is not a 'controlled action' for the purposes of this section (and hence does not require approval).[73]

- Where a bilateral agreement,[74] ministerial declaration, accredited management arrangement or authorisation process[75] provides that the action does not require approval.

- Pre-existing uses.[76]

- Where the action is an action described in s 160(2) (foreign aid or aviation operations subject to a special approval process).[77]

The defence where a person undertakes RFA forestry operations in accordance with an RFA[78] is discussed in detail in Chapter 3.

5.4.8 Where World Heritage Triggers EIA under the Act

In order to gain Ministerial approval for an action likely to significantly impact the world heritage values of a declared World Heritage property, a person or government agency must apply through a referral, pursuant to the EPBC Act's environmental impact assessment ('EIA') and approval scheme, described in Chapter 2.

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[72] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(a), 15A(4)(a).
[73] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(c), 15A(4)(c).
[74] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b), 29-31.
[75] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b),32-37M.
[76] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b), 43A-43B.
[77] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(d), 15A(4)(d).
[78] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 12(2)(b), 15A(4)(b), 38-42.

Recall from Chapter 2 that, where a person proposes to take an action that they think may or does need approval (eg they believe it may or will be likely to have a significant impact on the world heritage values of a declared World Heritage property), they must refer the proposal to the Minister.[79] If the person believes the action will not require approval, they can still refer the proposal to the Minister for a determination, under s 75, on whether or not approval is required.[80]

If the Minister decides, under s 75, that the action is not a 'controlled action', then the action may lawfully be taken without further assessment or approval. If the Minister decides that the action is a 'controlled action', then it is subject to EPBC Act assessment and approval requirements.

5.5 Constitutionality of the Act's World Heritage Provisions

The *World Heritage Convention*, eg, art 4, imposes a stringent environmental duty on Australia which, as a well-resourced, developed nation with considerable experience and expertise in World Heritage management,[81] could reasonably be expected to pursue the highest level of protection for its World Heritage properties. Given its circumstances, this high level of environmental obligation applies to Australia even in respect of those obligations which allow a certain level of discretion as 'appropriate' for each country.[82]

If the EPBC Act fails to discharge all of Australia's obligations under the *World Heritage Convention*, this would not of itself invalidate the Act. Failure to comply with all of the obligations assumed under a treaty only prevents a law being

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[79] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68(1).
[80] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68(2).
[81] David Haigh, 'Australian World Heritage, the Constitution and International Law' (2005) 22 *Environmental and Planning Law Journal* 385, 385-386.
[82] See, eg, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*'), art 4.

supported by the external affairs power if the deficiency is sufficiently substantial to prevent the law being properly characterised as implementing the treaty.[83]

Accordingly, given High Court precedents (including three specific to the *World Heritage Convention*),[84] it is submitted that the external affairs power provides ample Commonwealth legislative power to support full implementation of the Convention. In addition to the external affairs power, World Heritage (and many other) provisions of the EPBC Act can also find support from other heads of power, eg, the corporations power.[85]

A live issue regarding the EPBC Act's World Heritage provisions is whether they go far enough to fully implement the Convention and its stringent protective obligations.

5.5.1 Too Much Reliance on State and Territory Law?

It could be questioned whether the EPBC Act's considerable scope for reliance on State or Territory laws through bilateral agreements and bilaterally accredited management plans is a valid exercise of Commonwealth legislative power. However, in the *Port Hinchinbrook Case*, the Full Court of the Federal Court held that the Minister had not erred in being satisfied of certain matters under the WHPC Act by reason of arrangements that had been put in place under Queensland legislation.[86]

Justice Branson considers it 'doubtful the provisions of the [EPBC] Act concerning bilateral agreements are accurately described as provisions allowing the Commonwealth to delegate its environmental assessment powers to the States and

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[83] *Victoria v Commonwealth* (1996) 187 CLR 416 ('*Industrial Relations Act Case*') 488.
[84] *Tasmanian Dam Case* (1983) 158 CLR 1;*Tasmanian Forests Case* (1988) 164 CLR 261; *Wet Tropics Case* (1989) 167 CLR 232. See also, eg, *Industrial Relations Act Case* (1996) 187 CLR 416.
[85] *Australian Constitution* s 51(xx).
[86] *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 77 FCR 153 (Northrop, Burchett and Hill JJ) (Full Court of the Federal Court) and see the High Court's refusal of the applicant's special leave application: *Port Hinchinbrook Case* [1998] 6 Leg Rep SL8a (Gaudron and McHugh JJ, 13 March 1998).

Territories.'[87] Rather, Her Honour suggests, the EPBC Act provisions allowing bilateral agreements and bilaterally accredited management plans

> may well be regarded by the courts as a legislative framework not for delegation of the Commonwealth's environment assessment powers but rather as a legislative framework within which the Commonwealth may fulfil its duty under Article 4 of the *World Heritage Convention* by a means other than itself conducting an environmental assessment.[88]

If the courts follow Her Honour's approach and construe bilateral agreements and bilaterally accredited management plans as a legislative framework within which the Commonwealth may fulfil its duty under art 4 of the *World Heritage Convention*, then relevant provisions of the EPBC Act (and indeed, bilateral agreements and management plans) should be judicially interpreted so as to fulfil Australia's stringent obligations under art 4. Otherwise, Australia could be in breach of the Convention.

5.6 Key Limits in the EPBC Act for World Heritage Protection

Three key limitations to the EPBC Act in respect of World Heritage protection are discussed below. They are:

- The Act's restriction to significant impacts on 'world heritage values' (as distinct from impacts on the World Heritage property); and
- The lack of any EPBC Act requirement to identify or nominate places of outstanding value (and thereby protect them), contra Convention obligations.

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[87] Justice Catherine Branson, 'The Environmental Protection and Biodiversity Conservation Act 1999 – Some Key Constitutional and Administrative Issues' (1999) 6 *Australasian Journal of Natural Resources Law and Policy* 33, 43.
[88] Ibid.

- Lack of EPBC Act capacity to protect for forests at threat, unless they are on the World Heritage List.

5.6.1 Restriction to Significant Impacts on '*world heritage values*'

One general limitation is that EPBC Act protections apply only to a significant impact on the 'world heritage values'[89] of a 'declared World Heritage property'.[90] Subsections 12(3)-(4) of the EPBC Act provide:

> (3) A property has ***world heritage values*** only if it contains natural heritage or cultural heritage. The ***world heritage values*** of the property are the natural heritage and cultural heritage contained in the property.
>
> (4) In this section:
>
> ***cultural heritage*** has the meaning given by the *World Heritage Convention*.
>
> ***natural heritage*** has the meaning given by the *World Heritage Convention*. [emphasis in original]

Thus, the EPBC Act does not protect all the area of a 'declared World Heritage property', nor even all of its values. The Act protects only the 'natural heritage' or 'cultural heritage' contained in the property. Given the definitions of these two terms in the *World Heritage Convention*[91] (including the requirement that they be of outstanding universal value from a specified point of view), the Act's limitation to

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[89] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 12(3) (definition of 'world heritage values').
[90] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 13 (definition of 'declared World Heritage property').
[91] *World Heritage Convention*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975), arts 1-2. See the definitions of 'natural heritage' and 'cultural heritage' set out above n 11.

the 'world heritage values' of a declared World Heritage property (instead of protecting the property itself) can leave much of a property unprotected.[92]

Australia's 'values approach' to the *World Heritage Convention* and its *Operational Guidelines*[93] has been rejected by the expert advisory body the International Union for the Conservation of Nature (IUCN), and by the World Heritage Committee.[94] David Haigh argues that the embodiment of the 'values approach' in the EPBC Act renders its World Heritage provisions unconstitutional insofar as they fail to implement the Convention and the *Operational Guidelines.*[95] It is difficult to see how the Act's limitations to World Heritage protections comply with Australia's obligations under the *World Heritage Convention*, eg, arts 4 and 5, and the Convention's requirements for sympathetic management of World Heritage buffer zones. However, constitutional invalidation of the Act's World Heritage provisions would require the failure to be so significant that the legislation cannot be read as implementing the treaty.[96] That requirement seems a long bow to draw in respect of the Act's 'values approach' alone, and not necessarily environmentally desirable since that could leave World Heritage Areas without the Act's protections.

Even without determining Haigh's argument as to the constitutionality of the EPBC Act, his case for amendment of its World Heritage provisions to expressly protect the whole of, and the integrity and/or authenticity of, each declared World Heritage property[97] is persuasive.

Macintosh, writing from a practical perspective, observes that it is difficult to ascertain the 'world heritage values' of a specific property (absent a consolidated

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[92] See, eg, David Haigh, 'World Heritage — Principle and Practice: A Case for Change' (2000) 17 *Environmental and Planning Law Journal* 199; and Haigh, above n 81.
[93] World Heritage Committee, above n 9.
[94] Haigh, above n 81, 390-392.
[95] Ibid 393-395.
[96] Branson, above n 87.
[97] Haigh, above n 81, 395.

register confirming its world heritage values). Then, '[e]ven when the values are obtained, they can be ambiguous and difficult to apply to a particular set of facts.'[98] He therefore suggests that 'A more effective means of providing statutory protection for World Heritage Areas and Ramsar Wetlands [for which similar problems arise] may be to require all developments, or developments of a particular nature, within a defined area to be referred to the Minister.'[99] This would certainly be more readily ascertainable and should include:

(a) the World Heritage Area; plus

(b) a buffer zone (encouraged under the Convention) extending a standard specified distance from the boundary (though that distance able to be amended as appropriate for each unique World Heritage Area).

An amendment to achieve (a), while also enabling protection of species (eg wedge-tailed eagles) which are part of a property's 'world heritage values' but range outside,[100] including beyond a buffer zone, is suggested in the next section.

5.6.2 No EPBC Act Protection until 'in a declared World Heritage property' v Convention Identification and Nomination Duties

Similarly unprotected are 'natural heritage' or 'cultural heritage' that is not 'contained in' a declared World Heritage property. Unless the Minister chooses to

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[98] Andrew Macintosh, 'Why the Environment Protection and Biodiversity Conservation Act's Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives' (2004) 21 *Environmental and Planning Law Journal* 288, 310.
[99] Ibid (citations omitted).
[100] Similar to the spectacled flying foxes in *Booth v Bosworth* (2001) 117 LGERA 168 ('*Flying Foxes Case*'). The killing of flying foxes when they ventured outside the boundaries of the Wet Topics World Heritage Area was held to constitute a significant impact on the 'world heritage values' of that declared World Heritage property.

make and act upon a temporary declaration under s 14 of the EPBC,[101] this leaves areas of outstanding universal value outside the boundaries of a declared World Heritage area unprotected.[102] That is contrary to Australia's *World Heritage Convention* duties of identification[103] and nomination[104] set out at 5.2.1 and 5.2.3 above respectively.

This has been particularly problematic in forests adjacent to the TWWHA, given:

- the Australian Government's refusal over many years until 2013 to heed repeated (albeit polite and diplomatic) formal decisions by the World Heritage Committee requesting Australia to nominate such forest areas adjacent to the TWWHA for addition to it;[105] and

- ongoing controversial logging in many such areas, eg iconic valleys such as the Weld (see photo Figure 5.1 end of this chapter), Styx, and Florentine, until 2013 when they were World Heritage Listed.

5.6.3 RFA Forestry Exempt Until Property World Heritage Listed

Even if the Minister did choose to make and act upon a temporary declaration of a declared World Heritage area under s 14 of the EPBC,[106] this regulates non-forestry actions, but does not apply to forestry until the area is World Heritage Listed (by the Committee at its annual meeting). ie Logging of forests of outstanding universal

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[101] See above 5.4.3 for discussion of the Minister's power to temporarily declare a World Heritage property under s 14.
[102] Tasmanian forests adjacent to the TWWHA were logged until included in the TWWHA extension listed in June 2013.
[103] *World Heritage Convention*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975), art 5.
[104] Ibid, art 11(1).
[105] Decision 37 COM 8B.44 at <http://whc.unesco.org/download.cfm?id_document=123631&type=doc> at para 2 recalled Decision 32 COM 7B.41, Decision 34 COM 7B.38, Decision 34 COM 8B.46 and Decision 36 COM 8B.45.
[106] See above 5.4.3 for discussion of the Minister's power to temporarily declare a World Heritage property under s 14.

value is exempt from the EPBC Act, until they are World Heritage Listed, even despite any emergency s 14 declaration due to imminent threat, as explained below. This is contrary to Convention obligations such as arts 4-5.[107]

Recall from Chapter 3 that, firstly, the EPBC Act's Pt 3 protection regime (which contains the previously mentioned civil penalty provisions and offences) 'does not apply to an RFA forestry operation that is undertaken in accordance with an RFA'.[108]

Secondly, however, EPBC Act s 42 provides that ss 38-41 and RFA Act s 6(4) (ie the RFA exemptions), do not apply to forestry operations that are:

> (a) in a property included in the World Heritage List; or
>
> (b) in a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention; or
>
> (c) incidental to another action whose primary purpose does not relate to forestry.'[109]

Para 42(c) is examined in Chapter 7, in the context of Gunns Limited's pulp mill proposal. Para 42(a) is key to the TWWHA case study in the next section.[110] Commercial forestry operations are not currently undertaken 'in' the TWWHA, but s 42 does not preclude this possibility, subject to EPBC Act approval. Logging in a World Heritage Area may seem far-fetched, but in May 2013 the Tasmanian Upper House amended State legislation to, inter alia, permit (under Tasmanian law) in forests then proposed as extensions to the TWWHA, which in June 2013 were so listed by the World Heritage Committee at its annual meeting:[111]:

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[107] Set out at section 5.2.
[108] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38(1); RFA Act s 6(4).
[109] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 42.
[110] Section 5.7.
[111] The 'world heritage values' of a property are the natural heritage and cultural heritage contained in the property: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 12(3), quoted at 5.6 above then explained.

(a) 'special species timber harvesting' (generally old growth Tasmanian rainforest species – though any species can be prescribed by regulation)[112] on any land in reserves but designated 'Special Species Contingency Areas'; or

(b) removal of any land from such reserves which includes part of what are now TWWHA listed extension forests.[113]

EPBC Act s 42(a) would render forestry operations in a World Heritage Listed property subject to the standard EPBC Act scheme, in particular Pt 3 protections and Pt 7 EIA, summarised in Chapter 2. Recall from Chapter 2 that an action likely to *significantly* impact the 'matter protected' for the MNES is an offence under Pt 3 unless it has EPBC Act approval (granted under Pt 9) which generally requires prior assessment (under Pt 7). Hence, forestry operations would require referral under the EPBC Act if:

- 'in a property included in the World Heritage List' (eg the TWWHA, now including its extensions); and
- likely to *significantly* impact on the 'world heritage values' of the property.

The para 42(a) wording 'in a property included in the World Heritage List' is used rather than 'declared World Heritage property', defined in s 13 and set out at 5.4.3. In most situations, the two correspond, but not always. The former's use here means that RFA forestry operations complying with s 38 (ie in accord with an RFA) *cannot*

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[112] *Tasmanian Forests Agreement Act 2013* (Tas) s 19(1) includes the definition that:
special species timber includes the wood of the following species:
(a) blackwood (*Acacia melanoxylon*);
(b) myrtle (*Nothofagus cunninghamii*);
(c) celery-top pine (*Phyllocladus aspleniifolius*);
(d) sassafras (*Atherosperma moschatum*);
(e) huon pine (*Lagarostrobos franklinii*);
(f) silver wattle (*Acacia dealbata*);
(g) *any other timber that is prescribed* by the regulations; (emphasis added).

[113] Upper House amendment enacted in *Tasmanian Forests Agreement Act 2013* (Tas) s 19(2).

be regulated by the EPBC Act until a property is World Heritage Listed. The temporary protection gained by declaring a 'declared World Heritage property' pursuant to EPBC Act ss 13(2), 14, 15 while its world heritage values are under threat and the property being considered for listing, prevent other threatening actions, but not forestry (due to RFA exceptionalism). This is ironic given that the ss 14, 15 temporary protection power for a 'declared World Heritage property' not yet listed corresponds to that applied to some Tasmanian forests by the *Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987* (Cth),[114] then upheld by the High Court in the '*Tasmanian Forests Case*'.[115]

Forestry operations proposed 'in a property included in the World Heritage List' and likely to significantly impact its world heritage values would, presumably, be referred or called in and declared to be a 'controlled action'. In making any subsequent approval decision, the Minister would be prohibited from acting inconsistently with 'Australia's obligations under the *World Heritage Convention*'.[116] However, s/he could decide that the forestry operations were consistent with the Convention (albeit, this would seem difficult to defend, if challenged legally).[117]

Thus, forestry operations just outside the boundary of a declared World Heritage area are, by ss 38 and 40, exempt from the Act's Pt 3 Pt 3 prohibitions and offences, without requiring EPBC Act approval — even if they significantly impact on:

- unlisted forests of 'natural heritage' or 'cultural heritage' outside the boundary; or.

- world heritage values (eg species) ranging across the boundary.

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[114] Boer, above n 37.
[115] *Richardson v Forestry Commission* (1988) 164 CLR 261 ('*Tasmanian Forests Case*'); see eg Tsamenyi, Bedding and Wall, above n 37.
[116] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 137.
[117] As in, for example, *Project Blue Sky v Australian Broadcasting Authority* (1998) 195 CLR 355

Other industries so impacting in the latter manner fall under the EPBC Act.[118] So RFA exceptionalism gives forestry an anti-competitive advantage over them.

5.7 Case Study: Impacts of RFA Exemptions on the TWWHA

The following case study explores World Heritage problems caused by RFA exceptionalism in greater depth and in the specific context of the TWWHA. It includes recent efforts by the Liberal Party (now governing Australia) to have forest extensions to the TWWHA in June 2013 removed from the World Heritage List.

The Australian Government's February 2008 State of Conservation report for the TWWHA referred inter alia to the *Wielangta* litigation[119] and Gunns Limited's Tamar Valley pulp mill proposal, noting that neither was located near the TWWHA.[120] However, the report did not detail the extent to which legislative amendments relevant to these cases had further exempted RFA forestry operations from the EPBC Act. [121]

In March 2008, a three-member World Heritage monitoring mission visited Tasmania to view forestry operations adjoining parts of the eastern and northern boundaries of the TWWHA. The mission consisted of a representative from the

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[118] See *Flying Foxes Case* (2001) 117 LGERA 168, which, inter alia, held that an action taken outside the boundaries of a declared World Heritage property could significantly impact the world heritage values of the property. See, eg, Chris McGrath, 'The Flying Fox Case' (2001) 18 *Environmental and Planning Law Journal* 540.

[119] *Forestry Tasmania v Brown* (2007) 167 FCR 34. .

[120] Australian Government, 'State Party Report on the State of Conservation of the Tasmanian Wilderness World Heritage Area' (Australian Government, 1 February 2008) <http://www.environment.gov.au/heritage/publications/strategy/tas-state-party-report-feb08.html> 20-21. Review of the report, which was criticised by NGOs, is beyond the scope of this thesis.

[121] See Chapter 6 and Chapter 7 respectively as to the amendment of the Tasmanian Regional Forest Agreement following the trial judgment of Marshall J in *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34 and the insertion of *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2B) prior to *The Wilderness Society Inc v Minister for the Environment and Water Resources* (2007) 166 FCR 154.

UNESCO World Heritage Centre, the International Council of Monuments and Sites (ICOMOS) and the IUCN.

Groups making representations to the mission included a number of environmental NGOs and the Tasmanian Aboriginal Land and Sea Council. They argued that RFA forestry operations adjacent to these boundaries were compromising (eg, through edge effects, the risk of regeneration burns escaping, etc):

- natural heritage and cultural heritage, outside the TWWHA boundaries; and
- the integrity of the TWWHA itself.

Industry organisations and the Tasmanian and Commonwealth governments denied this, arguing that the TWWHA and adjacent forestry operations were well-managed.

In July 2008, the World Heritage Committee (comprising twenty-one member States, at that time including Australia), held its 32nd session in Quebec City, Canada. The meeting's business included considering the TWWHA monitoring mission's report and subsequent advice from the IUCN. In its decision on the TWWHA, the World Heritage Committee takes note of the monitoring mission's findings and, inter alia:

> Reiterates its request to the State Party to consider, at its own discretion, extension of the property to include appropriate areas of tall eucalyptus forest, having regard to the advice of IUCN; and also further requests the State Party to consider, at its own discretion, extension of the property to include appropriate cultural sites reflecting the wider context of Aboriginal land-use practices, and the possibility of re-nominating the property as a cultural landscape.[122]

[122] Tasmanian Wilderness (Australia) (C/N 181 bis), World Heritage Comm, Decision 32 COM 7B.41, 32nd sess, 78, WHC-08/32.COM/24, (2008) <http://whc.unesco.org/archive/2008/whc08-32com-24e.doc>.

These requests implicitly acknowledged that the TWWHA excludes some 'areas of tall eucalyptus forest' (having regard to the advice of IUCN, the specialist advisor on 'natural heritage') and Aboriginal cultural sites which would warrant extension of its boundaries if Australia, 'at its own discretion,' was willing to follow this course. This implies that the Committee was satisfied that appropriate such forest areas and cultural sites were 'of outstanding universal value' so as to comprise further 'natural heritage' and 'cultural heritage' respectively, as those terms are defined in the WHC.[123] The concept of a 'cultural landscape' is discussed in the next chapter.

However, the Committee's wording makes clear that the existence of such heritage was a necessary, but not sufficient, condition for extension of the TWWHA, such an extension requiring also the support of Australia, 'at its own discretion'. This reflects the deference of the Committee to state sovereignty, and the lack of WHC compliance mechanisms beyond public 'shaming' of State Parties.

The World Heritage Committee's decision was seized on by environmental non-government organisations (ENGOs) which demanded

> a moratorium on logging … while a proper process is enacted to ensure areas such as the Weld, Styx and Upper Florentine Valleys and the Great Western Tiers are protected and incorporated as part of the WHA.[124]

Federal Environment Minister Garrett also welcomed the Committee's consideration of the mission's report on the TWWHA but stated, inter alia, 'The Australian Government has no plans to extend the current boundary into production forests.'[125]

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[123] See the WHC definitions of 'natural heritage' and 'cultural heritage' above n 11.
[124] The Wilderness Society (Tasmania) Inc, 'World Heritage Committee Calls for Increased Protection of Tasmania's World Class Forests' (Media Release, 7 July 2008) <http://www.wilderness.org.au/articles/world-heritage-committee-calls-for-increased>.
[125] The Hon Peter Garrett MP, Minister for the Environment, Heritage and the Arts, 'International Experts Conclude Tasmanian Wilderness is Well-Managed' (Media Release, 7 July 2008) <http://www.environment.gov.au/minister/garrett/2008/pubs/mr20080707a.pdf> . See also Matthew

'Production forests' refers to State Forest zoned for logging. If the Minister is satisfied that 'some or all of the world heritage values of [a specified] property are under threat'[126] (including threat from forestry operations), then he or she has power under the EPBC Act to declare the property to be 'a declared World Heritage property'[127] for up to one year.[128] This power can be used to extend (under Australian law) the boundary of a property previously submitted to the World Heritage Committee.[129]

Given the discretionary deference to state sovereignty contained in the Committee's decision, the Australian Government's rejection of its polite (albeit reiterated) requests to consider extensions of the TWWHA does not, of itself, breach the WHC. However, the Committee's implicit acknowledgment in its extension requests that some:

- areas of tall eucalyptus forest comprising 'natural heritage' (having regard to the advice of IUCN); and
- Aboriginal cultural sites comprising 'cultural heritage'

lie outside the property and would benefit from extensions, should have alerted Australia to its WHC duties.

Along the eastern and northern boundaries of the TWWHA, in areas of State Forest zoned for 'production', significant forestry operations continue, including in areas of high conservation value forest. Some of these operations are periodically disrupted

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Denholm, 'Peter Garrett Rejects Heritage Call to Protect Eucalypt Forests', *The Australian* 8 July 2008 <http://www.theaustralian.news.com.au/story/0,25197,23985607-5006788,00.html> 1.

[126] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(1)(b)(ii).

[127] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(1).

[128] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(7).

[129] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 14(1) Note 2 specifically states, 'The Minister may make an extra declaration to cover property that is an extension of a property previously submitted to the World Heritage Committee.'

by protest actions from ENGOs, generating further 'grist for political dispute'.[130] For example, the Huon Valley Environment Centre have protested against forestry roads which, it asserts, are being pushed into globally significant 'remote tract[s] of old growth forest' to open up for logging areas 'contiguous with the Tasmanian [Wilderness] World Heritage Area.'[131] They cited in support a map, apparently based on Forestry Tasmania's Three Year Wood Production Plans, from which planned logging coupes can be pinpointed at <http://lynxgeos.com/TasCoupeMap/#>.

5.7.1 World Heritage Values Outside TWWHA Confirmed 2012 – but only Nominated once Sufficient Australian Political Will

In recent years, forestry industry, union and ENGOs have worked together through 'roundtable' negotiations seeking a resolution to Tasmania's forestry conflict.[132] As part of that process, in 2012, an expert Independent Verification Group (IVG) examined some 572,000 ha of the unreserved, publicly owned native forest available for logging which ENGOs claimed to be of high conservation value (HCV). The IVG found that, in general, the ENGOs' claims as to the conservation values of their proposed reserves were 'largely substantiated'.[133] The IVG found that addition of the ENGO proposed reserves to the National Reserve System (NRS) in Tasmania would increase its Comprehensiveness by 17% and improve Adequacy.[134]

In particular, the IVG found that:

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[130] Dryzec, above n 20.
[131] Jenny Webber, 'Forest Protest in Tasmania's Southern Forests Today: New Old Growth Logging Road Blocked by Conservationists in Tasmania's Picton Valley', Huon Valley Environment Centre, Media Release, 14 June 2011 < http://tasmaniantimes.com/index.php?/weblog/article/mill-sale-hinges-on-forestry-peace-deal/>.
[132] <http://www.forestsagreement.tas.gov.au/about-tfa/tasmanian-forests-agreement-2012-signatories-agreement/>.
[133] Jonathan West, 'Capstone Report' (Independent Verification Group, March 2012) <http://www.environment.gov.au/land/forests/independent-verification/report.html>, 15.
[134] Ibid 15.

> The current TWWHA boundary in many places lacks ecological integrity or is deficient from a management perspective, and creates an artificial barrier to natural ecological interactions. Also, the existing boundaries detract from the integrity of the TWWHA by not encapsulating the distribution of natural attributes that contribute to existing World Heritage values.135

The IVG found that none of the minor changes to the TWWHA boundary since its inscription in 1989 'have solved the fundamental problems relating to adjacent areas of likely heritage significance.'[136] Accordingly, IVG Technical Report 5A proposed a number of TWWHA boundary revisions 'to resolve the integrity issues and lessen the management challenges'.[137] The main conclusions from the IVG heritage report were:

- *The majority of ENGO proposed reserves meet one or more National or World Heritage criteria,* and formal national or international heritage assessment is warranted for most of the ENGO clusters.

- … They [many ENGO proposed reserves] not only have values in their own right, but combined with existing reserves, *significantly improve the viability and ecological integrity of these existing reserves.*[138]

Federal Environment Minister Tony Burke welcomed the release of the IVG report:

> For the first time we have an independent view of the current demands for wood supply and the different conservation values of areas within Tasmania.
>
> This independent information provides a foundation for any discussions about jobs, timber communities or conservation.139

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[135] Ibid 17.
[136] Ibid 17-18.
[137] Ibid 18.
[138] Ibid (emphasis added).
[139] Tony Burke and Bryan Green, 'Independent Verification Group advice released' (Media Release, 23 March 2012)

When the roundtable talks appeared to have failed after a key industry organisation withdrew, Minister Burke said he would no longer proceed with World Heritage boundary extensions.[140]

However, a month later, the roundtable parties signed an historic agreement, the Tasmanian Forest Agreement 2012 (TFA), with the TWWHA extension as the first substantial conservation outcome of these agreements.[141] Mr Burke was then asked, 'It'll also mean significant status changes for lots of the Tasmanian landscape. Can you meet the requirements for national parks and World Heritage listing that's being proposed in this document?' He replied:

> Certainly the.., World Heritage part of it, which is a direct Commonwealth responsibility is something that.., we would be.., we.., we'd be in a position to go ahead with. The areas that have been identified, as I understand it, are all areas that would satisfy the World Heritage definition, so.., that part of it is all possible.142

Mr Burke's acknowledgement that specified unprotected areas identified in the roundtable agreement are 'are all areas that would satisfy the World Heritage definition'[143] amounted to an acknowledgment that Australia's protective duties under the *World Heritage Convention* arts 4-5 apply there. Given that, Minister Burke's prior position (making TWWHA boundary extensions contingent on industry support), was contrary to Australia's Convention obligations. This, and the

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[140] ABC News, 'Forest Talks Fail after Two-year Negotiation', 27 October 2012 (Tony Burke) <http://www.abc.net.au/news/2012-10-27/forest-talks-fail/4337026>.

[141] The Tasmanian Forest Agreement (TFA) is annexed to the *Tasmanian Forests Agreement Act 2013* (Tas). For more TFA information and supporting materials, see <www.forestsagreement.tas.gov.au>.

[142] Leon Compton, Interview with Tony Burke, Environment Minister, Australian Government, ABC Mornings 936 Radio Interview, 26 November 2012 <http://blogs.abc.net.au/tasmania/2012/11/statewide-mornings-on-demand-261112.html> (emphasis added).

[143] Presumably by 'World Heritage definition Mr Burke was referring to the definition(s) of:

- 'world heritage values' in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 12(3); and /or
- the constituent components of 'world heritage values', namely:
  - cultural heritage as defined in the WHC art 1; and/or
  - natural heritage as defined in the WHC art 2.

fact the nomination took so many years, after prolonged logging in, and conflict over, iconic forests now included in the TWWHA extension (a flashpoint in the decades' old 'forest wars'[144] in Tasmania. demonstrates that the EPBC Act does not implement the Convention's duties of identification and nomination,[145] leaving that to political discretion.

5.7.2 TWWHA Extension

However, in a case of 'better late than never', at the end of January 2013 Mr Burke did nominate a TWWHA extension to UNESCO. In June 2013, the World Heritage Committee annual meeting approved Australia's request (to expand the Tasmanian Wilderness World Heritage Area (TWWHA) by some 170,000 hectares.[146] This 'TWWHA extension' comprises:

> over 50,000 hectares of existing public and private reserves (… such as Mt Field National Park and additional parts of the Mole Creek Karst National Park), along with nearly 120,000 hectares of land due to be reserved via the processes outlined in the *Tasmanian Forests Agreement Act 2013* [Tas].[147]

The latter 120,000 ha includes tracts of forest along the TWWHA's former northern (Great Western Tiers) and eastern (eg valleys of the Huon, Weld, Styx and upper Florentine rivers) boundaries.[148] Information released by the federal Department of Sustainability, Environment, Water, Population and Communities states that, in addition to listing glacial alpine areas (such as Mt Field National Park):

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[144] See eg Judith Ajani, *The Forest Wars* (Melbourne University Press, 2007); Buckman, above n 20; and Rob Blakers, *Wild Forest: Endangered Tasmania* (The Wilderness Society (Tasmania) Inc, 2008).
[145] See 5.6.2 above.
[146] Decision 37 COM 8B.44 at <http://whc.unesco.org/download.cfm?id_document=123631&type=doc>; see also Tasmanian Government, Department of Infrastructure, Energy and Resources, 'World Heritage Planning' <http://www.forestsagreement.tas.gov.au/supporting-our-environment/world-heritage-planning/>.
[147] Ibid.
[148] See <www.environment.gov.au/heritage/places/world/tasmanian-wilderness/information.html#extension>.

> The extension [protects] additional areas of exceptional beauty, particularly majestic stands of tall eucalypt forests… increases the extent of wet eucalypt forests within the property and will enhance the connectivity between its tall eucalypt forest and rainforest.
>
> Additional important habitat for rare and threatened species such as the endangered wedge-tailed eagle and the Tasmanian devil are also included in the boundary extension.[149]

The TWWHA extension addressed the repeated requests from the World Heritage Committee to Australia for the addition of such forest areas adjacent to the TWWHA.[150] The new boundaries of the expanded TWWHA have been gazetted under the EPBC Act to incorporate the TWWHA extension.[151] The extension includes some previously logged areas, but allowing them to regenerate to form part of the wider wilderness landscape is consistent with the Convention art 5 obligations including 'rehabilitation'.

5.7.3 TWWHA Extension Excision Attempt

Tasmanian and federal Liberal (ie conservative) party leaders opposed the TFA and sought delisting to reverse at least part of the TWWHA extension.[152] Senator Richard Colbeck stated that he had 'already written to the World Heritage Council [sic] seeking to have these areas removed'.[153] The Tasmanian Liberal Party supports their Federal counterpart's position and actively proposes to log in the TWWHA

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[149] Ibid.
[150] Decision 37 COM 8B.44 at <http://whc.unesco.org/download.cfm?id_document=123631&type=doc> at para 2 recalled Decision 32 COM 7B.41, Decision 34 COM 7B.38, Decision 34 COM 8B.46 and Decision 36 COM 8B.45.
[151] Tasmanian Government, Department of Infrastructure, Energy and Resources, 'World Heritage Planning' <http://www.forestsagreement.tas.gov.au/supporting-our-environment/world-heritage-planning/>.
[152] Andrew Darby, 'Coalition Push for Third Ever World Heritage Reversal'. *The Age*, 3 September 2013. <www.theage.com.au/federal-politics/federal-election-2013/coalition-push-for-third-ever-world-heritage-reversal-20130903-2t2gl.html>.
[153] Matt Smith, 'Tasmania's Entire World Heritage Area Under Threat If Protected Areas Rolled Back'. *The Mercury*, 12 September 2013. <www.themercury.com.au/news/tasmania/tasmanias-entire-world-heritage-area-under-threat-if-protected-areas-rolled-back/story-fnj4f7k1-1226717252461>. Note, at the time of that article, Senator Colbeck was referred to as Opposition spokesperson on forestry.

extension. Tasmanian Liberal Opposition leader, the Hon Will Hodgman, said that, if elected at the March 2014 State election, his government would facilitate the state-owned corporation Forestry Tasmania logging in the TWWHA extension. Mr Hodgman said his purpose would be to carry out logging for specialty[154] timbers:

> We'd allow that to happen and to provide that resource that's needed to grow the industry... including in the recently listed world-heritage area.[155]

5.7.3.1 World Heritage excision (via Modification)

The Australian Government lodged a request to modify the TWWHA boundary in early 2014 seeking to excise forested parts of the TWWHA extension. In accordance with its procedures, the World Heritage Committee sought evaluations of the request by its relevant Advisory Bodies, the IUCN and ICOMOS.[156]

Australia framed its request as a 'minor modification'[157] to the TWWHA boundary. A minor modification is defined as 'one which has not a significant impact on the extent of the property, nor affects its Outstanding Universal Value.'[158] The TWWHA extension was added as a minor modification, so it seems likely that removing it, especially if only part thereof, would not have 'a significant impact on the extent of the property'. However, there is a strong argument that removing TWWHA extension forests would 'affect' the Outstanding Universal Value of the (expanded) TWWHA. If so, then the Committee could determine the reduction request to be a 'significant' modification.[159] If reduction was accepted as a minor modification, then the Committee could rule on it at its annual meeting in mid-2014. If, however,

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[154] Defined to include Tasmanian endemic rainforest species: see above n 112.
[155] Tyson Shine, 'Liberals set to log world heritage forests', *ABC* online, 10 September 2013. <www.abc.net.au/news/2013-09-10/liberals-set-to-log-world-heritage-forests/4948076>.
[156] UNESCO World Heritage Centre, 'Operational Guidelines for the Implementation of the *World Heritage Convention*' Paris, 2012 <http://whc.unesco.org/en/guidelines/>, paras 164-165.
[157] Ibid paras 164-164.
[158] Ibid para 163.
[159] Ibid paras 165, 168.

Australia's proposal were considered by the Committee to be a 'significant' modification, then the Committee would be unlikely to make any determination regarding the fate of the TWWHA extension before its 2015 meeting.

5.7.3.2 Consequences of World Heritage Logging

In *Queensland v Commonwealth* (the *Wet Tropics Case*),[160] the High Court held the Committee's determination that an area was of 'outstanding universal value' to be conclusive evidence of that. So if the Liberals succeeded in persuading the World Heritage Committee to reverse its 2013 decision (at least excising forests the Liberals wish to re-open for forestry – they are less concerned with the listing of Mt Field National Park, Tasmania's oldest), then it is likely that Australian courts would defer to that. Logging could then resume in delisted areas relying on RFA exceptionalism.

However, the voluminous documentation and expert opinion [161] supporting the World Heritage Committee's 2013 decision to extend the TWWHA, combined with past Committee decisions suggesting extension, strongly suggests that the vast bulk of the TWWHA extension is of 'outstanding universal value' and hence, at least 'natural heritage' (the extension also contains elements of 'cultural heritage', eg cultural landscapes, though it was not also nominated on this ground.) So the Liberals will need a strong case to succeed.

The Liberals are arguing that past logging in some parts of the now-listed areas deprived them of outstanding universal value to the extent of now under-mining the expanded TWWHA's integrity. The better view seems to this author that the extension enhances the TWWHA's integrity, and that logged areas can be rehabilitated over time, a duty under article 5.

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[160] *Queensland v Commonwealth* (1989) 164 CLR 261.
[161] <http://www.environment.gov.au/heritage/places/world/tasmanian-wilderness/resources.html>.

If the Committee maintains its 2013 listing, then the forests will remain on the World Heritage List: Australia cannot unilaterally withdraw them. Logging in the TWWHA extension, before, or in the absence of delisting would require EPBC Act approval. An approval under the EPBC Act could be challenged if contrary to the s 137(a) requirement for consistency with 'Australia's obligations under the *World Heritage Convention*'.[162] Logging in World Heritage listed forests (if they remain so) would seem difficult to reconcile with the *World Heritage Convention.* In addition to its positive duties of protection through to rehabilitation,[163] the Convention also contains prohibitions, eg relevantly requiring that its parties not take any deliberate measures that directly or indirectly damage their natural heritage.[164]

Furthermore, the 'Operational Guidelines for the Implementation of the *World Heritage Convention*'[165] contain more specific requirements, such as for a World Heritage property's 'integrity'.[166] In addition, a World Heritage property 'must have an adequate protection and management system to ensure its safeguarding'.[167] Protection and management[168] includes requirements regarding:

- 'Legislative, regulatory and contractual measures for protection';[169]
- 'Boundaries for effective protection';[170]
- 'Buffer zones'; [171] and

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[162] following the principles of *Project Blue Sky v Australian Broadcasting Authority* (1998) 195 CLR 355.
[163] See, eg, *World Heritage Convention*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975), arts 4-5.
[164] Ibid art 6(3).
[165] UNESCO World Heritage Centre, 'Operational Guidelines for the Implementation of the *World Heritage Convention*' Paris, 2012 <http://whc.unesco.org/en/guidelines/>.
[166] See eg ibid Ch II.E Integrity and/or authenticity at paras 87-95.
[167] Ibid para 78.
[168] Ibid Ch II.F Protection and management.
[169] Ibid para 98.
[170] Ibid 'Boundaries for effective protection' at paras 99-102.

- 'Sustainable use' ('The State Party … must ensure that such sustainable use or any other change does not impact adversely on the Outstanding Universal Value of the property.')[172]

Federal approval,[173] and the physical action of forestry operations,[174] in the TWWHA extension, unless delisted, would likely thus contravene various articles of the *World Heritage Convention* and its *Operational Guidelines* (such as those outlined above). Hence, an approval of logging in the TWWHA could be challenged as contrary to EPBC Act s 137(a).

5.7.3.3 World Heritage In Danger Risk for Entire TWWHA

World Heritage expert, Professor Peter Valentine, has flagged that the World Heritage Committee would see 'any threat to [newly listed forests as] a threat to the entire World Heritage area in Tasmania' and could decide to place the entire TWWHA property on the List of World Heritage in Danger.[175] The *Operational Guidelines*[176] set out a range of grounds on which the Committee can list a property as 'In Danger',[177] a precursor to exercising its ultimate sanction of removing[178] a property from the World Heritage List. The grounds for 'In Danger' listing relevantly include 'Severe deterioration of the natural beauty or scientific value of the property, as by … logging, firewood collection, etc'.[179] Normally, parties to the Convention fight to keep their World Heritage properties *off* the World Heritage in Danger list.

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[171] Ibid 'Buffer zones' at paras 103-107.
[172] Ibid para 119.
[173] Contrary to *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 137.
[174] Contrary to *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 12.
[175] Matt Smith, 'Tasmania's Entire World Heritage Area Under Threat If Protected Areas Rolled Back'. *The Mercury*, 12 September 2013. <www.themercury.com.au/news/tasmania/tasmanias-entire-world-heritage-area-under-threat-if-protected-areas-rolled-back/story-fnj4f7k1-1226717252461>.
[176] UNESCO World Heritage Centre, 'Operational Guidelines for the Implementation of the *World Heritage Convention*' Paris, 2012 <http://whc.unesco.org/en/guidelines/>.
[177] Ibid paras 177-191.
[178] Ibid paras 192-198.
[179] Ibid para 180(a)(ii).

Australia has previously made efforts to avoid this outcome when concerns were raised in relation to the impact of uranium mining in Kakadu and rabbit infestation on Macquarie Island.[180] The Australian Government has actively resisted the recent suggestion that development pressure and continued transportation of coal in the Great Barrier Reef warranted placing that property on the In Danger listing, and has committed to developing strategic management plans in an effort to satisfy the Committee that the Reef's outstanding universal values are not at risk.[181] In the context of ongoing concern and scrutiny by the World Heritage Committee regarding the Great Barrier Reef, logging in the TWWHA extension could also raise questions in respect of Australia's commitment to managing heritage values that could have implications beyond the Tasmanian property.

Finally, as Chapter 2 explained, acting contrary to the *World Heritage Convention* would also be inconsistent with Australia's obligations under the *Vienna Convention on the Law of Treaties* which, inter alia, codifies the fundamental duty of nation States to fulfil treaty obligations in good faith.[182]

5.8 Conclusion

This chapter's conclusion draws together the chapter's findings, particularly in terms of the key aspects of the *World Heritage Convention* which the chapter has demonstrated that Australia does not adequately implement through the EPBC Act and is currently breaching. Then follow recommendations for law reform of the EPBC Act to address its key short-comings in this respect:

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[180] Jenny Scott, Jamie Kirkpatrick and Tom Baxter, 'Macquarie Island in Danger', WWF-Australia, Sydney, 2001.
[181] Tim Stephens, 'A Reprieve, But the Great Barrier Reef Remains on Death Row'. *The Conversation*, 20 June 2013 <theconversation.com/a-reprieve-but-the-great-barrier-reef-remains-on-death-row-15364>.
[182] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26 codifies this fundamental norm, known as *pacta sunt servanda*.

- generally, in terms of domestic implementation of the Convention; then
- specifically, in relation to RFA exceptionalism.

5.8.1 The 'Constitutive' Function of Constitutional Law

Hanks describes the 'constitutive' function of constitutional law as setting 'the outer limits, the ground rules, for the political process':[183]

> For instance the decision of the High Court in Commonwealth v Tasmania, the Tasmanian Dam case, recognised the constitutional power of the Commonwealth to implement the [*World Heritage Convention*]. That decision opened the way for the Commonwealth to develop a national policy for the protection of environmentally sensitive areas and to impose that policy on State governments and private entrepreneurs. But the decision did not ensure the Commonwealth would do that – only that the Commonwealth had an expanded range of political choices. So it remained open to the Commonwealth to choose not to intervene to protect a particular area, a choice which might be influenced by such considerations as the need to encourage economic development or the desire to avoid antagonistic reactions from State governments.184

That accurately reflects the position under Australian domestic environmental law and political practice, particularly in relation to forestry. As seen in this chapter, in numerous instances the Commonwealth was called upon to prevent logging in areas now found to be of outstanding universal value (as documented in numerous reports (most recently the TFA Independent Verification Group), requested by the World Heritage Committee, and confirmed when it extended the TWWHA). However, until January 2013 (after the Tasmanian Forest Agreement was signed by all 'roundtable' parties), the Australian Government refused to nominate the TWWHA extension – no doubt due to the economic and/or political considerations Hanks identifies.

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[183] Peter J Hanks, *Constitutional Law in Australia* (Butterworths, 1991), 5.
[184] Ibid 5.

The above governmental desires anticipated by Hanks are understandable (especially given the history of Australian forest politics).[185] But if they prevent Australia meeting its obligations in MEAs, such as the *World Heritage Convention* duty (eg art 4), then they are gravely problematic as inconsistent with, inter alia:

- the specific treaty;
- the fundamental international norm of *pacta sunt servanda*;
- the codification of *pacta sunt servanda* in the *Vienna Convention on the Law of Treaties*;[186] and
- Australia's claim to be a 'good global citizen'.

Hence, this thesis sought to test that proposition through its Research Question 2.

This chapter argues that, when the threat to an area is such that non-intervention will result in Australia failing to discharge a *World Heritage Convention* duty (eg art 4), then the Commonwealth's responsibility to uphold that convention and Australia's international law duty to perform treaties in good faith[187] demands federal intervention. However, art 4 of the *World Heritage Convention* is not implemented by the EPBC Act unless an area is included in the World Heritage List (and hence, becomes 'declared' under the EPBC Act). To this extent, the art 4 duty to protect 'natural heritage' and 'cultural heritage' is not fully implemented by the EPBC Act. Accordingly, it is not compellable in domestic courts (which have traditionally privileged the Australian Parliament's supremacy over treaties signed and ratified by the Executive). Nevertheless, under international law the Commonwealth is duty-bound to intervene, and hence *should* do so to uphold:

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[185] See eg Ajani, above n 144.
[186] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26: see section 2.2.
[187] Ibid, art 26: see section 2.2.

- the integrity of the *World Heritage Convention*;
- Australia's international obligations under the convention and VCLT;[188] and
- its international reputation.

The *World Heritage Convention*, eg arts 4, 5, impose stringent obligations on State parties, particularly a developed nation such as Australia which possesses considerable expertise in natural and cultural heritage management. Given the stringency of *Convention* duties and the extent of Commonwealth constitutional power in this area, the EPBC Act should be amended so as to further and better implement convention obligations. For example, the EPBC Act's focus on 'world heritage values' needs to be addressed as Haigh suggests.[189] Instead, Australia sought, unsuccessfully, to impose its world heritage values approach on other Convention State parties.

In the past, Commonwealth implementation of obligations under the *Convention* was a source of high-profile constitutional controversy, with a succession of High Court cases confirming the breadth of the Commonwealth's external affairs power, but also some national pride at Australia's iconic World Heritage Areas. Australia breached its art 4-5 obligations by logging forests containing Convention cultural heritage and natural heritage prior to the TWWHA extension.

Today, the TWWHA is internationally recognised for its Aboriginal cultural heritage,[190] and natural heritage. Its wild landscape makes the TWWHA a Mecca for

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[188] Ibid.
[189] Haigh, above n 81, 395.
[190] Use of the term 'wilderness' to describe the South West is rejected by some Aboriginal Tasmanians who regard it as denying the region's Aboriginal occupancy over many thousands of years: see eg Michael Mansell, 'Comrades or Trespassers on Aboriginal Land' in Cassandra Pybus and Richard Flanagan (eds), *The Rest of the World is Watching* (1990), 104. Hence, use of the term in this context can be seen this as akin to the *terra nullius* doctrine which still pervaded the Australian common law until *Mabo v Queensland [No 2]* (1992) 175 CLR 1. The outstanding universal value of

walkers, rafters, bird-watchers and other outdoor enthusiasts. The Franklin River is an internationally recognised rafting destination, while more sedate activities such as cruises up the Gordon River have transformed much of Strahan from a remote fishing village to a thriving tourist town. Tourism has also provided a market to renew interest in the region's convict, Huon pining, and mining heritage, driving, for example, the restoration of the Abt Railway between Strahan and Queenstown.

After decades of dispute, many forests adjacent to the TWWHA were added to it in June 2013 for their 'outstanding universal value' under the *World Heritage Convention*, examined in this chapter's case study. Other forests of high conservation value, but far from the TWWHA, remain contentious. Now, the Liberals request that the World Heritage Committee delist part of the TWWHA extension, risks Australia becoming a World Heritage laughing stock, (or even, pariah), undermining its reputation, and potentially, wider State Practice under the Convention.[191] The move also carries economic risks to Tasmanian forestry and other industries.

5.9 World Heritage Law Reform Recommendations

As explained during this chapter, there are various aspects of the *World Heritage Convention* which the EPBC Act does not adequately implement. Following are recommendations for law reform of the EPBC Act to address those key shortcomings generally, then specifically in respect of RFA exceptionalism.

5.9.1 World Heritage Generally

The Convention duties of identification of cultural and natural heritage, and then their nomination for listing, explained at 5.2.3 and 5.6.2, are prime examples. Under

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both the natural and cultural heritage of the area would later be recognised through the listing of what is now named the 'Tasmanian Wilderness World Heritage Area', in spite of objections to the 'wilderness' nomenclature.

[191] Baxter, above n 3, 'Logging World Heritage Listed Forests: Unlawful and Uneconomic' (2013)(3) *National Environmental Law Review* 55.

the EPBC Act, this process is a discretionary political decision on the part of the Minister, which he can ignore – as illustrated by the Commonwealth's refusal to nominate the TWWHA extensions throughout the decades of requests, internationally and domestic, since 1989. The EPBC Act enables brakes on World Heritage nominations at the behest of State Governments (the current Tasmanian Government supported the TFA and associated TWWHA extension). Perhaps, given the prevalence of politics over law in this field, it took Labor Governments supported by Greens in both the Tasmanian and Australian Parliaments to fulfil Convention obligations through the TWWHA extension.

Another example is the EPBC's focus on protecting only world heritage values, and not necessarily the declared property itself. As explained at 5.6.3, Haigh's strong criticisms of Australia's world heritage values approach deserves at least some recognition, especially given the World Heritage community's rejection of Australia's efforts impose its approach globally. This is a subset of a wider issue in the EPBC Act regulating only significant impacts on the 'matter protected' for reach MNES, rather than the MNES itself.[192]

5.9.2 World Heritage – Forestry Reform for EPBC Act s 42(a), (b)

Through ss 38-41, the EPBC Act has thus largely abandoned the field in the regulation of RFA forestry operations, precluding the proper protection which the EPBC Act purports to provide for matters of national environmental significance. Para 42(a) does not adequately address this for World Heritage.

EPBC Act ss 42(a), (b) provide that neither ss 38-41, nor s 6(4) of the RFA Act, apply to forestry operations that are 'in a property included on the World Heritage List' or 'in a [Ramsar listed wetland]. This means that forestry operations in such

[192] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 34: see Chapter 2.

areas likely to significantly impact their 'matter protected'[193] would require assessment and approval under the EPBC Act. Any approval would need, inter alia, to 'not be inconsistent' with the relevant convention(s).[194]

If ss 38-41 were repealed, then ss 42 would be redundant so should simultaneously be repealed. Until then, however, the word 'in' prefacing both paras 42(a)–(b) unduly restricts their operation. For example, forestry operations upstream in the catchment (but outside the legal boundary) of a Ramsar-listed wetland could significantly impact on the wetland and/or its ecological character. This could be caused by impacts on its receiving water:

- quality (eg through forestry disturbing soil, causing turbidity); and/or
- quantity (eg thirsty plantations or regrowth native forest intercept rainfall and absorb more of it in growing than does mature old growth forest).

Yet even if significantly impacting the ecological character of a downstream Ramsar-listed wetland, such forestry operations above its boundary would not be 'in'[195] the wetland, so would not require EPBC Act approval if undertaken in an RFA region – providing they are undertaken in accordance with an RFA,[196] if one is in force.[197]

The EPBC Act's Pt 3 protections are limited to protecting only the 'matter protected' for a MNES, eg the world heritage values of a declared World Heritage property (as compared to the property itself). Paragraphs 42(a) and (b) should be amended to insert after the first occurrence of 'in' a phrase such as 'or significantly impacting on

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[193] 'world heritage values' or the ecological character of a declared Ramsar wetland: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 34.
[194] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 137. Listings under the World Heritage and Ramsar Conventions are not mutually exclusive. For example, Ramsar listing has been mooted for the GBRWHA and the Macquarie Island WHA.
[195] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 42(b).
[196] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38(1).
[197] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40.

[the relevant matter protected by EPBC Act Pt 3]'. So paras 42(a)-(b) should allow the EPBC Act to apply at least to forestry operations:

> (a) in a declared World Heritage property, or likely to significantly impact on *cultural heritage* or *natural heritage* as defined in the *World Heritage Convention*; or
>
> (b) in, or likely to significantly impact on the ecological character of, a wetland included in the List of Wetlands of International Importance kept under the *Ramsar Convention*; or …

EPBC Act ss 38-41 RFA exclusions would still remain problematic. However, at least the above amendments would go some way to protecting from forestry impacts a declared World Heritage property or Ramsar-listed wetland.

Figure 5.1 – Weld River 2013 World Heritage ©Rob Blakers <www.robblakers.com>

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Chapter 6 Promises to Protect Threatened Species: the *Wielangta Case*

> 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less'.
>
> 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
>
> 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'[1]

6.1 Introduction

This chapter examines the legal position of species facing a risk of extinction ('threatened species') when significantly impacted by RFA forestry operations. It does so primarily through analysis of the most significant legal case regarding this issue yet to come before the Australian courts,[2] including the response by the Australian and Tasmanian Governments during the litigation. In Tasmanian RFA (TRFA) clause 68, Tasmania had originally agreed *to* protect threatened species. That was replaced with wording whereby both the Commonwealth and State now agree that threatened species in Tasmania *are* protected.

This TRFA variation defeated the litigation,[3] and bulwarked Tasmanian forestry against challenge through the EPBC Act. The chapter argues that this litigation and its 'mid-stream' TRFA variation move the federal regulatory regime governing the forestry sector well beyond the bounds of appropriate co-operative federalism. Rather, the RFA regime now resembles more an inter-governmental agreement for

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[1] Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking Glass* (Penguin Group, first published 1865) 219.
[2] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34.
[3] Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008).

the federal legislature to vacate the forestry field to the States. This retreat by the Australian Government (complicit in emasculating off-reserve protections for endangered species in the Tasmanian RFA) now places in peril its capacity to ensure fulfilment of its environmental treaty responsibilities for those species.

6.1.1 Aim and Purpose of the Chapter

The aim of the chapter is to test the hypotheses H1 and H2 in the context of nationally-listed threatened species in Tasmania. The underlying purpose in so doing is to assist in answering the research questions RQ1 and RQ2.

Recall from Ch 3 that RQ1 questioned the claim that the RFAs provide 'an equivalent level of protection [of the environment] to that provided by the EPBC Act'.[4] This claim was cited by the SOFR as the rationale for why 'forestry operations undertaken in RFA areas do not require approval under the [EPBC] Act.'[5]

The hypothesis H1 posited (an affirmative answer to RQ1) that the Tasmanian RFA ('TRFA') provides an equivalent level of protection of the environment to that which the EPBC Act would provide from forestry operations *but for* the RFA exemption provisions. So, H1 will be supported in the context of nationally-listed threatened species if they are provided, by the TRFA, an equivalent level of protection to that which the EPBC Act would provide them *but for* the RFA exemptions.

Secondly, the chapter seeks to test H2 in the context of nationally-listed threatened species in Tasmania. H2 posited (an affirmative answer to RQ2), namely that 'The EPBC Act, RFA Act and RFAs provide sufficient environmental protection for the Australian Government to ensure that forestry operations do not derogate from

[4] Montreal Process Implementation Group for Australia, 'Australia's State of the Forests Report 2008' (Bureau of Rural Sciences, 2008) <http://adl.brs.gov.au/forestsaustralia/publications/sofr2008.html> ('SOFR') 186.
[5] Ibid.

fulfilment of its international obligations set out in the relevant MEAs. implemented in Australian law by the EPBC Act.' So H2 will be supported in the context of nationally-listed threatened species in Tasmania if they are sufficiently protected from forestry operations by the TRFA regime to satisfy Australia's relevant treaty obligations in respect of such species.

6.1.2 Legal Significance of Threatened Species

Threatened species (together with threatened ecological communities), comprise (once formally listed under the EPBC Act) the fourth-listed 'matter of national environmental significance' ('MNES') for which the Act purports to provide protection. The primary reason for this is that Australia is party to various international conventions which impose obligations in respect of such species. As discussed in Chapter 2, pursuant to the Australian Parliament's external affairs power,[6] the EPBC Act is the statute through which these obligations are now implemented in Australian domestic law.

As will be seen, certain provisions of the EPBC Act's s 3 objects clause directly address threatened species.[7] These provisions incorporate some wording taken directly from relevant conventions. This (along with express application of convention obligations elsewhere in the EPBC Act, eg s 139(1)) suggests the Act's species protection provisions purport to implement convention obligations, which would strengthen its constitutional validity. If the RFA forestry exemption prevents the EPBC Act adequately protecting threatened species from forestry operations, then it is important to test H1 and H2 to determine the extent of protection provided such species by the RFA regime, and whether this (in conjunction with any protection delivered by the EPBC Act), is sufficient to adequately implement Australia's convention obligations in respect of threatened species.

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[6] *Commonwealth of Australia Constitution Act 1900* (Cth) s 51(xxix).
[7] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(e).

6.1.3 Practical Significance of Threatened Species

A World Heritage Area or National Heritage place has a defined legal boundary (although protection of these areas and their values may require an additional 'buffer zone' between the gazetted boundary and activities such as forestry operations). Species, however, may have wide ranges (especially migratory species) with imprecise or 'fuzzy' boundaries that can change over time (eg as species respond or adapt to variable environmental factors). So, in the wild, such species do not conveniently confine themselves within the boundary of a protected area or reserve. Where forestry operations are undertaken in or adjacent to the habitat of a threatened species, some impact(s) on members of the local population could be expected. Therefore, it is likely that threatened species (in particular, those which range outside protected areas) are the MNES most commonly impacted by forestry operations. This makes 'off-reserve' conservation measures vital for those species.

6.1.4 Chapter's Case Study Method

In order to achieve its first aim, this chapter needs to test whether the TRFA provides 'an equivalent level of protection to that provided by the EPBC Act'[8] for threatened species (as described in 6.1.1 above). The chapter establishes the level of protection provided to threatened species by the EPBC Act primarily through desktop analysis of the Act. Also then considered are relevant provisions of the Australian Government's administrative guidelines regarding 'significant impact', a key threshold concept in the EPBC Act. These guidelines demonstrate the approach adopted by the Department responsible for enforcement of the Act.

The chapter then uses the case study described below to determine the extent of legal protection provided to threatened species by the TRFA. The extent of that legal

[8] Montreal Process Implementation Group, above n 4.

protection can be ascertained through analysis of the interpretation and application of the TRFA by courts in *Brown v Forestry Tasmania* (the *Wielangta Case*).[9] The respective levels of protection for threatened species provided by the EPBC Act and TRFA can then be compared to answer RQ1 in the context of threatened species.

The chapter's second aim is to determine if the legal protection provided to threatened species from the impacts of Australian forestry operations is sufficient to satisfy the federal Government's duty to ensure fulfilment of Australia's international obligations in respect of threatened species. In this context, the chapter focuses on key articles of the most relevant conventions implemented by the EPBC Act, namely the *Apia Convention* and *CBD*.

The EPBC Act purports to implement these convention obligations and provides a legislative regime for doing so,[10] supported by operative provisions including offences in Pt 3. Chapter 3 explained this EPBC Act regime in general terms. Specifically for threatened species, an action must not, without lawful excuse, significantly impact nationally-listed threatened species or ecological communities[11] without approval of the federal Environment Minister.[12] However, as explained in Chapter 4, the EPBC Act's Pt 3 protections do not apply to RFA forestry operations undertaken in accordance with an RFA.[13] So, the chapter asks:

- what degree of legal protection does the TRFA afford threatened species from the impacts of forestry operations; and
- does this suffice to meet Australia's international obligations?

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[9] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34, Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008) <http://www.austlii.edu.au/au/other/HCATrans/2008/202.html>. See also Bob Brown, *Bob Brown – Wielangta Landmark Trial* <http://www.on-trial.info> which includes, inter alia, links to relevant court documents.
[10] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Ch 5 Pt 13.
[11] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 18-18A.
[12] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 19(1)-(2).
[13] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 19(3)(a), 38-42.

6.1.5 Summary of the Chapter's Case Study

The extent (or, as this chapter demonstrates, lack) of legal protection afforded threatened species by the legal regime comprising the EPBC Act, RFA Act and TRFA in combination is best demonstrated by the only court case to examine their interaction. In the *Wielangta Case*, Senator Bob Brown attempted to use the EPBC Act to protect three endangered species from RFA forestry operations in Wielangta State Forest on Tasmania's East Coast. Senator Brown sought declarations and an injunction against the government business enterprise Forestry Tasmania ('Forestry Tasmania'), to prevent forestry operations significantly impacting on the species.

At trial, Senator Brown successfully obtained the orders sought against Forestry Tasmania for breaches of the TRFA and therefore, the EPBC Act. The decision (and the subsequent appeals) turned largely on the Tasmanian RFA cl 68, governing protection of threatened species. By cl 68 Tasmania 'agree[d] to protect [listed threatened species] through the CAR Reserve System or by applying relevant management prescriptions'. The trial judge held that the State to be in breach of the TRFA cl 68, and hence also the EPBC Act (the TRFA breach disentitling it to the protection of the RFA exemption provisions).[14]

Following the trial judgment, before the hearing of the Full Court appeal,[15] then Tasmanian Labor Premier Paul Lennon and Australian Liberal Prime Minister John Howard amended key provisions[16] of the TRFA, including cl 68.[17] This act of inter-governmental co-operation turned cl 68 from a commitment by Tasmania 'to protect

[14] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1 [293], revd (2007) 167 FCR 34.
[15] Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008) 848-62 (Kirby J and N J O'Bryan SC).
[16] See *Forestry Tasmania v Brown* (2007) 167 FCR 34, [80]-[84] setting out the amendments.
[17] The amendment 'midstream' the litigation was later criticised: Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008) (Kirby J); see below at 6.5.17.

[listed threatened species] through …' into a deeming provision whereby both 'the parties agreed that CAR protected rare and threatened species'.[18]

This TRFA variation removed at least any 'promissory quality'[19] of TRFA cl 68, replacing it with a legal fiction contradicting the trial judge's findings of fact. Ultimately, the variation defeated Senator Brown's High Court application for special leave to appeal, the High Court finding that the variation left his appeal with insufficient prospects of success to justify special leave.[20]

6.1.6 Contribution and Significance of the Chapter's Case Study

While judgments in the *Wielangta Case* will be the subject of critique and comment, given the finality of the High Court's decision, the most crucial aspect of the case for present purposes is the resultant law on issues of direct application to hypotheses of thesis. The case provides strong evidence for rejecting both H1 and H2. The Tasmanian RFA variation, the Full Court decision and the High Court's refusal of special leave to appeal, emasculate any protection the TRFA may (prior to the case) have been thought to provide threatened species. This leaves the Australian Government unable to ensure that its international obligations in respect of threatened species are met in Tasmanian forests.

The *Wielangta Case* is also highly significant at a number of other levels, in both legal and political terms. Legally, Brown's application was the first EPBC Act case to progress beyond the Full Court of the Federal Court to a special leave application before the High Court (albeit that leave was refused). It set important precedents, the implications of which this chapter will examine.

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[18] *Forestry Tasmania v Brown* (2007) 167 FCR 34, [95] paraphrasing the TRFA cl 68 variation.
[19] Ibid. The Full Court (concluding at [105]) unanimously over-ruled the trial judgement, including its interpretation and application of the original cl 68.
[20] Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008) 766-801 (Hayne J).

The parties were key political protagonists leading Australia's forestry debates:

- the applicant, Senator Bob Brown (leader of Australia's Green political movement throughout its emergence, and foundation federal parliamentary leader of the Australian Greens party);
- the respondent, Forestry Tasmania (formerly the Tasmanian Forestry Commission, now a government business enterprise established under the *Forestry Act 1920* (Tas));
- the interveners, the Australian and Tasmanian Governments, who joined the litigation as the parties to the TRFA, opposing Brown's application.

The high public profile of its parties and subject matter (Tasmanian forestry and iconic threatened species) made the case not merely one of public interest litigation, but also of interest to the public and media. This made the governments' TRFA variation 'midstream' the litigation all the more audacious – demonstrating the lengths to which both were willing to go to entrench RFA exceptionalism.

Given its high profile and significance, the *Wielangta Case* has been under-analysed in academic literature. The three tiers of judgments from trial, the Full Court, then the High Court, were described by Bleyer,[21] Sivayoganathan[22] and Church[23] respectively (noted later in this chapter). Each was critical of the TRFA variation and its implications for threatened species, but only Church's case note was written after the High Court decision. This author agrees with their criticisms of the TRFA variation and concerns for threatened species. This chapter extends both those themes in the overall context of the entire litigation, and goes further to consider implications of where the litigation leaves for Australia's international obligations.

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[21] Vanessa Bleyer, '*Brown v Forestry Tasmania [No 4] [2006]* FCA 1729 (19 December 2006) – Federal Court Finds Logging Unlawful' (2006) 4 *National Environmental Law Review* .
[22] Shashi Sivayoganathan, 'Forestry Tasmania v Brown: Biodiversity Protection — An Empty Promise?' (2007) 3 *National Environmental Law Review* 21.
[23] Imran Church, '*Fauna v Forestry*: The Wielangta Forest Litigation' (2009) 28 *University of Tasmania Law Review* 125.

6.1.7 Chapter Structure

This chapter is structured so as to flow from threatened species obligations under international conventions, down through the EPBC Act implementing them, to analysis of the leading Australian case in which the Act and its RFA exemption has been applied to Tasmanian forestry operations.

Accordingly, the chapter's next part lays out Australia's key international convention obligations requiring threatened species protection in contexts relevant to domestic forestry operations. The chapter then outlines key objects of the EPBC Act with reference to these convention obligations and considers EPBC Act implementation of the obligations in Australian domestic law. The chapter recalls the EPBC Act's s 38 exemption for RFA forestry operations, then focuses on a case study of the *Wielangta Case*[24] which tested this exemption. Key analysis of the case concerns its substantive implications for thesis research questions.

6.2 Australia's Convention Obligations to Protect Species

Australia is party to various international conventions relevant to threatened species. The foci of this section are the two of these conventions upon which the EPBC Act's objects in respect of threatened species affected by forestry are based. These are the *Convention on Conservation of Nature in the South Pacific* ('*Apia Convention*)[25] and the *CBD*,[26] certain key articles of which find reflection in threatened species objects of the EPBC Act (as explained in the next section). The derivation of this parallel wording suggests that the Act purports to implement at least these *Apia Convention*

[24] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34.
[25] Opened for signature 12 June 1976, ATS 41; 24 SD 103 (entered into force 26 June 1990) ('*Apia Convention'*).
[26] Opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('*Convention on Biological Diversity*').

and *CBD* obligations into Australian law. Accordingly, this section sets out those obligations so that Australia's compliance with them can later be assessed.

The EPBC Act also implements in Australian law the *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).*[27] However, as this convention relates to *international trade* in endangered species (such as wildlife smuggling), it is not presently relevant to forestry operations in Tasmania.

6.2.1 *Convention on Conservation of Nature in the South Pacific* ('*Apia Convention*')

This Convention imposes strong duties of 'protection' especially for threatened species. For example, Contracting Parties (including Australia) agree to:

> 1. … *in addition to the protection* given to indigenous fauna and flora in *protected areas*, use their best endeavours to protect such fauna and flora (special attention being given to migratory species) so as to safeguard them from unwise exploitation and other threats that may lead to their extinction.
>
> 2. … establish and maintain a list of species of its indigenous fauna and flora that are threatened with extinction. ….
>
> 3. … *protect as completely as possible as a matter of special urgency and importance* the species included in the list it has established …. The hunting, killing, capture or collection of specimens …. of such species shall be allowed only with the permission of the appropriate authority. Such permission shall be granted only under special circumstances, in order to further scientific purposes or when essential for the maintenance of the equilibrium of the ecosystem or for the administration of the area in which the animal or plant is found.[28]
> *[emphasis added]*

The *Apia Convention* repeatedly imposes a duty to 'protect'. The first listed article above highlights the internationally recognised importance, firstly, of establishing

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[27] Opened for signature 3 March 1973, [1976] ATS 29 ('*CITES*').
[28] Ibid.

protected areas. However, the article requires measures 'in addition to the protection given to indigenous fauna and flora in protected areas….' This requires State parties to take off-reserve measures, beyond the boundaries of protected areas/reserves, using their 'best endeavours' to protect native species there (especially migratory species), 'so as to safeguard them...' Best endeavours may provide some leeway for poor, small island states in the Pacific. But it imposes stringent obligations on Australia, a rich, developed nation with substantial conservation expertise and capacity, and the *Apia Convention* State party most able to protect its native species.

The third duty is to 'protect as completely as possible as a matter of special urgency and importance the [listed threatened] species …' The words following 'protect', make this duty to threatened species even more onerous than the first-listed duty to use 'best endeavours' to protect all native fauna and flora, whether threatened or not.

The EPBC Act's implementation of these obligations is examined at 6.3.2 below.

6.2.2 *Convention on Biological Diversity* (*'CBD'*)

The *CBD*[29] had 191 parties by mid-2008, its non-parties being the USA, Iran and Somalia.[30] The USA's objections during the Convention's drafting related not to wildlife nor habitat, the focus of this chapter, but rather to the draft text regarding technology transfer, financing, biotechnology and access to resources.[31] President George Bush Snr refused to sign the convention when it was opened for signature at Rio Earth Summit, telling the world its final text, 'Threatened to retard biotechnology and undermine the protection of ideas.'[32] The Clinton administration

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[29] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).
[30] Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & the Environment* (Oxford University Press, 3rd ed, 2009) 614.
[31] Ibid.
[32] George Bush, Statement to the United Nations Convention on Environment and Development, Rio de Janeiro, 12 June 1992, quoted in Birnie, Boyle and Redgwell, above n 30.

subsequently signed the *CBD* but Congress has refused to permit ratification (and seems unlikely to 'do so in the foreseeable future').[33]

Interestingly, the first recital of the *CBD* Preamble begins by recognising the 'intrinsic value of biological diversity', in addition to its many other values: ecological, genetic, socio-economic, scientific, educational, cultural, recreational and aesthetic.[34] In the context of this phrase, it has been noted that 'Preambular recitals … are … important as a guide to the parties' intentions in adopting particular measures.'[35] Thus the Preamble's acknowledgement of the intrinsic value of biodiversity may provide important guidance in interpreting articles of the *CBD* as discussed below.

The term 'intrinsic value of biological diversity' is an ecocentric, rather than anthropocentric, concept: with particular relevance to species at risk of extinction. The 'intrinsic value' of a species' ongoing existence implies value beyond that to humanity. As such, 'intrinsic value' is not amenable to being 'outweighed' by socio-economic gains to humanity, or a small subset of it, through a utilitarian calculation.

The language of conservation biology has progressed since the 1976 *Apia Convention* and varies with the context. As Prof Bates notes, the *CBD* 'stresses the importance of conserving ecosystems, not merely protecting species.'[36] In terms of threatened species, the *CBD* obliges Australia, 'as far as possible and as appropriate' (similar language to the *World Heritage Convention* art 4) to promote:

- 'the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings'; and

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[33] Birnie, Boyle and Redgwell, above n 30.
[34] Ibid 618.
[35] Ibid.
[36] Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 7th ed, 2010) citing Nicole Dixon, 'Protection of endangered species : how will Australia cope?' (1994) 11 *Environmental and Planning Law Journal* 6.

- 'the recovery of threatened species, *inter alia*, through the development and implementation of plans or other management strategies'.[37]

The *CBD* permits 'sustainable use' of natural resources such as forests. '*Sustainable use*' is defined as 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations'[38] This definition prohibits (for anthropocentric, albeit inter-generational, purposes)[39] resource use conducted in a manner or rate that leads to 'the long-term decline of biological diversity'. It thereby logically precludes use that leads, in the long-term, to extinction of:

- a species (that being a permanent loss of biodiversity); or
- arguably, other 'components of biological diversity', eg:
    - a sub-species such as the Tasmanian wedge-tailed eagle (different from the sub-species on mainland Australia); or
    - isolated populations of the same species if they exhibit sufficient biological differences (such as the disease-free Tasmanian Devil population isolated in the North West).

Such use leading to extinction would be neither 'sustainable use' nor consistent with the *CBD* obligations in respect of threatened species quoted above.

Further to the above *CBD* definition of '*sustainable use*', the phrase 'maintaining its potential to meet the needs and aspirations of present and future generations' requires observance of 'the principle of inter-generational equity'.[40] In the context of a

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[37] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993), arts 8(d), 8(f).
[38] Ibid.
[39] Ibid.
[40] A principle of ESD: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A(c).

comparative resource use such as fishing, this phrase arguably further requires that relevant components (eg population of a fish species or 'stock') not be over-fished, but rather, be maintained at stable equilibrium levels so that similar stock numbers remain available for current and future generations. This is consistent with the principles of ESD such as that of inter-generational equity, and common-sense prudent management. However, given that the 'tragedy of the commons'[41] has seen over-fishing of so many fish stocks, many are now subject to specific international conventions such as the *Convention on the Conservation of Antarctic Marine Living Resources* ('*CCAMLR*').[42] In the absence of such a binding forestry-specific treaty, MEAs such as the *CBD* establish relevant universal international law. However, the regional *Apia Convention*,[43] also binding Australia, implemented by the EPBC Act, and discussed below, has some parallels to the *CCAMLR* so the fishing analogy has some utility in considering forestry, another industry based on harvesting a renewable resource.

The *CBD's* obligations are not considered onerous by Snape.[44] However, the thrust of his article argues that the US should 'wake up' and join the *CBD*, so it is possible his article may be flavoured by a concern not to frighten Congressional (war)horses who have to date successfully kept the US outside the *CBD* tent as one the few nation non-parties. Likely reasons for the US position extend beyond the scope of this thesis to include industry lobbying such as by 'big pharma' concerned to avoid restraint by the *CBD*'s benefit-sharing requirements. This chapter is more concerned

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[41] Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science, New Series* 1243.
[42] opened for signature 20 May 1980, 1329 UNTS 47 (entered into force 7 April 1982). More general conventions such as CITES have also been used in fisheries, eg to list southern blue fin tuna, a fish species in particular peril due to over-exploitation.
[43] *Convention on Conservation of Nature in the South Pacific*, opened for signature 12 June 1976, [1990] ATS 41 (entered into force 26 June 1990).
[44] William J Snape, 'Joining the *Convention on Biological Diversity*: A Legal and Scientific Overview of Why the United States Must Wake Up' (2010) 10(3) *Sustainable Development Law & Policy* 6. See also William J Snape (ed), *Biodiversity and the Law* (Island Press, Washington, 1996) in Freya Dawson, 'Analysing the Goals of Biodiversity Conservation: Scientific, Policy and Legal Perspectives' (2004) 21 *Environmental and Planning Law Journal* 6, 6.

with the implementation of Australia's international obligations in respect of threatened species. The next section focuses on how this is undertaken through the EPBC Act.

6.3 EPBC Act Implementation of Threatened Species Obligations

This section considers, next, the extent to which key objects of the EPBC Act reflect Australia's international obligations to protect threatened species. It then, explains how operative provisions of the Act implements these obligations through the Act's requirements for threatened species listing (at 6.3.3), EIA (at 6.3.4) and development approvals (at 6.3.5). The latter require, in particular, that approvals for actions significantly impacting threatened species not breach Australia's obligations under relevant international treaties.

6.3.1 EPBC Act Object s 3(1)(a)

Recall from Chapter 2 that the objects of the EPBC Act are specified in s 3(1) as:

> (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
>
> (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
>
> (c) to promote the conservation of biodiversity; and
>
> ….
>
> (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and
>
> ….[45]

Note also that Australian statutory interpretation requires, inter alia, that:

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[45] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1).

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.[46]

As will be seen below from analysis of the *Wielangta Case*, the word 'for' preceding 'provide' in a phrase such as the s 3(1)(a) 'provide *for* the protection of the environment' (*emphasis added*), drastically weakens any interpretive requirement that might otherwise arise from an object to 'provide protection…'. The former phrase will be seen to necessitate only the establishment of a framework within which protection can occur, rather than requiring delivery of any actual protection.

6.3.2 EPBC Act Object s 3(1)(c)

In respect of the EPBC Act s 3(1)(c) object 'to promote the conservation of biodiversity', s 3(2) goes further, using much stronger language. Subsection 3(2) asserts that 'In order to achieve its objects, the Act', relevantly:

> (e) enhances Australia's capacity to ensure the conservation of its biodiversity by including provisions to:
>
> (i) *protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species)* and ensure the conservation of migratory species; and
>
> (ii) …
>
> (iii) *protect ecosystems* by means that include the *establishment and management of reserves*, the recognition and protection of ecological communities *and* the promotion of *off-reserve conservation measures*; and
>
> (iv) identify processes that threaten all levels of biodiversity and implement plans to address these processes;

[46] *Acts Interpretation Act 1902* (Cth) s 15AA. In the specific context of the *Wielangta Case*, see Church, above n 23, 134-136 and authorities cited therein. More generally, see eg: Jan Rohde, 'The Objects Clause in Environmental Legislation' (1995) 12 *Environmental and Planning Law Journal* 80.

Subparagraphs 3(2)(e)(i) and (iii) appear to incorporate aspects of the *Apia Convention*[47] while using the more contemporary language of *CBD* obligations such as to promote 'the recovery of threatened species ….' and 'the protection of ecosystems ….' [48] Recall that *Apia Convention* Contracting Parties must, inter alia:

> 1. … *in addition to the protection* given to *indigenous fauna and flora* in *protected areas*, use their best endeavours to protect such fauna and flora (special attention being given to migratory species) so as to safeguard them from unwise exploitation and other threats that may lead to their extinction. [49] [*emphasis added]*

While the precise language differs, key principles of this *Apia Convention* article are reflected in EPBC Act s 3(2)(e) insofar as:

- '*the protection* of … *indigenous fauna and flora*' (*Apia Convention*) translates to 'protect native species' in s 3(2)(e)(i);
- '*in addition to* the protection given to indigenous fauna and flora in *protected areas*' (*Apia Convention, emphasis added*) translates to '…. off-reserve conservation measures' in s 3(2)(e)(iii).[50]

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[47] *Convention on Conservation of Nature in the South Pacific*, opened for signature 12 June 1976, [1990] ATS 41 (entered into force 26 June 1990) ('*Apia Convention*').
[48] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) arts 8(f), 8(d) (entered into force 29 December 1993); the text of arts 8(f), 8(d) are quoted fully earlier.
[49] *Convention on Conservation of Nature in the South Pacific*, opened for signature 12 June 1976, [1990] ATS 41 (entered into force 26 June 1990) ('*Apia Convention*').
[50] Similarly, the *Apia Convention* refers to 'migratory species' being given special attention, while *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(e)(i) foreshadows provisions to 'ensure the conservation of migratory species'. Migratory species are now also subject to multiple more specific conventions not presently relevant, including the Bonn Convention and bilateral migratory bird agreements such as between Australia and Japan, .and Australia and China. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) implements these conventions through a listed migratory species MNES trigger consisting of provisions similar to those for listed threatened species (and also subject to the RFA exemptions). Thus, migratory species are not separately explored herein as they are in a similar *Environment Protection and Biodiversity Conservation Act 1999* (Cth) legal position to threatened species but have not been the subject of litigation equivalent to the *Wielangta Case*.

Thus, the EPBC Act s 3(2) claims in respect of the Act's threatened species provisions appear based on corresponding species protection articles of the *Apia Convention* and *CBD*. To this extent, the abovementioned claims made in EPBC Act s 3(2)(e) effectively assert that the Act includes provisions which implement in Australian domestic law the corresponding articles of the *Apia Convention* and *CBD*. An example of such an operative provision can be found in EPBC Act s 139(1) which expressly precludes the Minister from acting inconsistently with Australia's obligations under these conventions in deciding whether or not to approve the taking of an action (see below at 6.3.5).

6.3.3 EPBC Act Threatened Species Listing Regime

Australia has long maintained threatened species lists pursuant to its *Apia Convention* obligation to 'establish and maintain a list of species of its indigenous fauna and flora that are threatened with extinction.'[51] The EPBC Act now governs that national threatened species regime, providing a scheme[52] for listing categories of nationally 'listed threatened species'[53] and 'listed ecological communities'.[54]

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[51] The species contained in Schedule 1 to the *Endangered Species Protection Act 1992* (Cth) became the sole initial constituents of the list of threatened species established under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) when the former Act was repealed upon commencement of the latter: see *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 178(2).

[52] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Ch 5 Pt 13

[53] 'listed threatened species' means a native species included in the list referred to in s 178: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 528. 'Species' is defined in s 528.

[54] 'listed threatened ecological community' means an ecological community included in the list referred to in s 181: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 528. 'Ecological community' is defined in s 528.

6.3.4 EPBC Act Assessment Trigger for Actions Significantly Impacting Threatened Species

An action likely to significantly impact on a nationally-listed threatened species or ecological community is *prima facie* prohibited and constitutes an offence.[55] This is a specific application of the general scheme of protection for *all* matters of national environmental significance in EPBC Act Part 3, as explained in thesis Chapter 2. The EPBC Act Part 3 offences, and hence EPBC Act assessment requirements, are triggered not by any impact, but only by an action which has, will have, or is likely to have a 'significant impact'[56] on a MNES. The Australian Government has issued administrative guidelines to 'provide overarching guidance on determining whether an action is likely to have a significant impact on a MNES.'[57] These guidelines describe a significant impact as 'an impact that is important or of consequence having regard to its context and intensity'.[58] As Dr McGrath notes,[59] these guidelines now adopt (albeit, without attribution) the test of significance accepted and applied by Branson J in *Booth v Bosworth*.[60] The guidelines specific to endangered species suggest that most forestry operations impacting on them would likely to meet the guidelines' criteria for significance.[61]

6.3.5 EPBC Act Approval Must Not Breach Relevant Treaties

Defences available to the abovementioned Part 3 offences, include:

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[55] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 18A, 67A.
[56] Ibid.
[57] Department of the Environment, Water, Heritage and the Arts, Significant Impact Guidelines 1.1: Matters of National Environmental Significance, (2009) <http://www.environment.gov.au/epbc/publications/nes-guidelines.html>.
[58] Ibid.
[59] Chris McGrath, 'The Flying Fox Case' (2001) 18 *Environmental and Planning Law Journal* 540, 548, 549-554.
[60] [2001] FCA 1453 [99] (*Flying Fox Case).*
[61] Department of the Environment, Water, Heritage and the Arts, above n 57.

- if the action has been granted Ministerial approval under Part 9 of the EPBC Act[62] (which requires a prior Ministerial decision as to environmental assessment of the action); or

- is exempt from the above by a provision of Part 4 (see the next section).

Importantly for Australia's international obligations, EPBC Act s 139(1) limits a Ministerial approval by requiring that:

> In deciding whether or not to approve for the purposes of a subsection of section 18 or section 18A the taking of an action, and what conditions to attach to such an approval, the Minister must not act inconsistently with:
>
> (a) Australia's obligations under:
>
> (i) the Biodiversity Convention; or
>
> (ii) the Apia Convention.; or
>
> (iii) CITES; or
>
> (b) a recovery plan or threat abatement plan.[63]

The mandatory nature of this 'must not' limitation on the Minister's EPBC Act approval power is an important safeguard requiring approvals not to breach Australia's relevant treaty obligations (nor a recovery plan or threat abatement plan for a species).

Given the analogous wording of the s 139(1) prohibition to that applied by the High Court in *Project Blue Sky v Australian Broadcasting Authority*,[64] a Ministerial approval in contravention of a specified treaty could be challenged under the

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[62] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 19(1), (2).
[63] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 139(1).
[64] (1998) 195 CLR 355.

Administrative Decisions (Judicial Review) Act 1977 (Cth), including by a third party using the EPBC Act's extended standing provisions[65] (which are relatively open compared to its predecessor legislation, as explained in Chapter 2 and, in the context of this chapter's case study, at 6.5.2 below).

The express reference in s 139(1)(a) to the *CBD* and *Apia Convention* also leaves no doubt that those treaties could be relevant in the judicial construction of other provisions of the Act, pursuant to the s 15AB(2)(d).[66]

Thus, the EPBC Act's threatened species provisions provide reasonably robust requirements that Ministerial approval of an action not breach Australia's obligations under relevant international conventions. This statutory check on Ministerial discretion could, if breached, be subject to judicial review at the behest of a third party satisfying the EPBC Act's wide standing requirements.[67]

However, as Chapter 3 explained, the EPBC Act's Part 3 protections do not apply to an RFA forestry operation undertaken in accordance with an RFA.[68] Hence, as explained in the following sections, RFA forestry operations can (and do)[69] significantly impact listed threatened species or listed threatened ecological communities without the need for Ministerial approval under the EPBC Act. It follows that such forestry operations are also exempted from the s 139 requirements, such as compliance with relevant environmental treaties, placing at risk Australia's observance of these international obligations.

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[65] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 487, 488.
[66] In the interpretation of a provision of an Act, material that may be considered includes 'any treaty or other international agreement that is referred to in the Act': *Acts Interpretation Act 1902* (Cth) s 15AB(2)(d).
[67] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 487, 488.
[68] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 19(3)(a), 38-42. *Regional Forest Agreements Act 2002* (Cth) s 6(4).
[69] See, eg, *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34, Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008).

6.4 Exclusion of RFA Forestry Operations from EPBC Act Part 3

As explained in the previous section, EPBC Act Part 3 contains the Act's primary protections for threatened species, including various civil penalties and offences.[70] However, recall from Chapter 3 that all of Part 3 is subject to exceptions in Part 4 of the Act, which includes the provisions enacting RFA exceptionalism.

The RFA exceptions include, most notably for present purposes, s 38(1). It provides:

> (1) Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.[71]

The terms 'RFA' or 'regional forest agreement' and 'RFA forestry operation' have the same meaning as in the RFA Act.[72] These are explained in Chapter 3's sections 3.8 and 3.11. The RFA Act defines '*RFA forestry operations*' by reference to each RFA region.[73] In Tasmania, the term means:

> forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Tasmania) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA).[74]

Hence, in Tasmania, 'RFA forestry operations' means any forestry operations not prohibited by the Tasmanian RFA, since it applies across the State.

Thus, all such 'forestry operations' in an RFA region 'undertaken in accordance with an RFA' are exempt from EPBC Act Part 3 and its protective prohibitions on

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[70] For example, taking an action that does, will or is likely to significantly impact a listed threatened species is prohibited, unless approved (under Part 9) by the Federal Environment Minister: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 34.
[71] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38(1). Subsection 38(1) is mirrored by s 6(4) of the *Regional Forest Agreements Act 2002* (Cth).
[72] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38(2).
[73] *Regional Forest Agreements Act 2002* (Cth) s 4 definition of '*RFA forestry operations*'.
[74] Ibid.

significantly impacting a listed threatened species.[75] This reverse suggests that for forestry operations to enjoy this s 38 exclusion from the EPBC Act Part 3, they must accord with the relevant RFA. Hence, in *Brown v Forestry Tasmania*[76] Senator Bob Brown attempted to injunct non-RFA compliant forestry operations by applying the EPBC Act to them. He had mixed success – winning only at first instance, not on appeal – as explained in the following case study.

6.5 Brown v Forestry Tasmania (*Wielangta Case*)

6.5.1 Overview of Case Study's Contribution and Context

The following case study analyses the *Wielangta Case*, the first EPBC Act case to:

- substantively challenge RFA forestry operations; or
- reach an application for special leave to appeal to the High Court (the 2-1 refusal of leave denying Senator Brown a hearing by the High Court's Full Bench – the pinnacle in the Australian court hierarchy).

The case study is highly significant, as noted at 6.1.6 above, and particularly so for this thesis. It demonstrates, firstly, the lengths to which both the Australian and Tasmanian heads of governments went, in varying the Tasmanian RFA (following the trial judgment for Senator Bob Brown), to entrench RFA exceptionalism. That is, they replaced TRFA clause 68:

- in which Tasmania originally agreed *to* protect threatened species;
- with wording whereby both the Commonwealth and State now agree that threatened species in Tasmania *are* protected.

Secondly, the resultant law, as held by the Full Federal Court and left intact by the High Court, deems endangered species protected under the TRFA, by a legal fiction

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[75] See, eg, *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 34.
[76] (2006) 157 FCR 1, revd (2007) 167 FCR 34.

which, in actual fact, denies them federal legal protection from forestry. This, it will be argued, breaches relevant Australian treaty obligations.

Thirdly, the fact the two executive governments made such an RFA amendment, achieving the above outcome, without the need to amend any statute, exemplifies the extent to which federal Parliament, through the RFA Act, has delegated to executive governments largely unfettered power to amend RFAs so as to reduce their environmental protection, at the expense of Parliamentary oversight.

The case study starts by positioning the *Wielangta Case* in its contemporary political and legal context. Previous chapters provided an historical political and legal background, particularly their coverage of the EPBC Act (Chapter 2) and RFA Act (Chapter 3). As summarised in the next section, Senator Bob Brown has long opposed the RFA regime *politically*, as Greens leader in the Tasmanian and then Australian Parliaments. His *Wielangta* litigation directly challenged it *legally*, using the EPBC Act's third party enforcement provisions against Forestry Tasmania's forestry operations in the Wielangta State Forest. In this respect, Brown's litigation can be viewed as building on the 1990's wood chip export cases brought by ENGOs,[77] noted in Chapters 2 and 3.

However, Brown went further in challenging off-reserve forestry operations, not on the basis that the forest in question met World Heritage or national heritage criteria, but rather that it was vital habitat for three species listed as endangered under the EPBC Act. He sought injunctive relief under the EPBC Act by arguing that the forestry operations did not accord with the TRFA, and hence, were not excluded from the EPBC Act by its s 38. While Brown succeeded at trial (6.5.5 below), he lost

[77] See *North Coast Environment Council v Minister for Resources* (1994) 55 FCR 492; *Tasmanian Conservation Trust v Minister for Resources & Gunns Limited* (1995) 55 FCR 516; Jan McDonald, 'Public Interest Environmental Litigation: Chipping Away Procedural Obstacles' (1995) 12 *Environmental and Planning Law Journal* 140.

on appeal (6.5.8-6.5.9) and in the High Court (6.5.10), after the Australian and Tasmanian Governments varied the Tasmanian RFA, as set out at 6.5.7 below.

Subsequent analysis from 6.5.11 onwards explains how the litigation, particularly the TRFA variation and judgments regarding it, leave Australian forestry law with strengthened RFA exceptionalism. Remaining sections of the case study analyse domestic and international law implications of the case in the context of H1 and H2.

6.5.2 Standing of the Applicant, Senator Bob Brown

The EPBC Act grants the Minister or an 'interested person' locus standi / standing to apply to the Federal Court for an injunction where 'a person has engaged, engages or proposes to engage in' an act or omission contravening the Act or its regulations.[78]

'[I]nterested person' is defined for this purpose to include, firstly, an individual Australian citizen or ordinary resident:

> (a) the interests of whom 'have been, are or would be affected by the conduct or proposed conduct';[79] or
>
> (b) who has 'engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the 2 years immediately before:
>
> (i) the conduct; or
>
> (ii) in the case of proposed conduct — making the application for the injunction.'[80]

Secondly, an organisation (whether incorporated or not) is an 'interested person' if:

> (a) the organisation's interests have been, are or would be affected by the conduct or proposed conduct; or
>
> (b) if the application relates to conduct—at any time during the 2 years immediately before the conduct:

[78] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 475(1).
[79] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 475(6)(a).
[80] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 475(6)(b).

> (i) the organisation's objects or purposes included the protection or conservation of, or research into, the environment; and
>
> (ii) the organisation engaged in a series of activities related to the protection or conservation of, or research into, the environment;

Both the paras (b) tests in EPBC Act sections above extend beyond the more traditional Australian requirement for affected 'interests', as in paras (a). The range of conduct sufficient to satisfy the paras (b) tests above is expanded by the EPBC Act's extremely wide-ranging definition of 'environment',[81] including, eg, constituent components.

Professor Bates, in his chapter on standing in Australian environmental law,[82] surveys a progressive trend of 'statutory relaxation of the standing rules',[83] observing in the para (b) tests above[84] a continuation of reforms from EPBC Act predecessor statutes.[85] However, Prof Bates observes that the para (b) test above seems to extend beyond prior Federal Court jurisprudence 'by not requiring any specific connection between the matter being litigated and the plaintiff — a general environmental interest would seem to suffice.'[86] For example, Prof Bates contrasts with pre-EPBC Act cases the inaugural application of EPBC Act standing rules in its first injunction

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[81] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 528 definition of 'environment'.
[82] Bates, above n 36.
[83] Ibid [15.24] ff.
[84] In the context of equivalent standing test wording in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 487 which, as Bates notes (at [15.27]), relaxes for *Environment Protection and Biodiversity Conservation Act 1999* (Cth) purposes the 'person aggrieved' test under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
[85] Bates, above n 36, citing specifically the *World Heritage Properties Conservation Act 1983* (Cth) and *Endangered Species Protection Act 1992* (Cth). For example, under the *World Heritage Properties Conservation Act 1983* (Cth) (WHPC Act) an organisation was taken to be a 'person aggrieved' in relation to a decision by the Minister to grant consent to an impact under WHPC Act ss 9 or 10 if the decision related to a matter within the organisation's objects and range of activities: s 13(5)(b). The Federal Court could, on the application of an 'interested person' grant an injunction restraining a person from doing an act which was unlawful under ss 9 or 10 of the Act: s 14(1). The reference to an 'interested person' in s 14(1), in relation to an act that was unlawful by virtue of ss 9 or 10, included an organisation whose objects, purposes and activities include the protection or conservation of the property in relation to which the act is unlawful: s 14(3)(b).
[86] Ibid [15.27].

case.[87] There, the applicant, Dr Carol Booth, a professional and volunteer conservationist and (of particular relevance for that case focused on flying fox electrocution) a wildlife carer of orphaned flying foxes, amply fulfilled s 475(6) standing requirements.[88] Whereas Dr Booth would, as her barrister has written, arguably have lacked standing at common law.[89]

Similarly, the applicant, Senator Bob Brown, had no neighbourly nor proprietary interest near Wielangta Forest, but was eminently over-qualified to meet the EPBC Act s 475(6)(b) definition of 'interested person', having engaged in a series of activities for protection or conservation of the environment within the required preceding two years (and well beyond that).

A long-standing campaigner for environmental protection (including, in particular, of Tasmanian wilderness and forests), Senator Brown had been internationally recognised as an environmental champion in prestigious awards, by international environmental organisations and media (since at least 1983 when *The Australian* newspaper named him its Australian of the Year). He moved from the Tasmanian to the Australian Parliament in 1996, the year BBC's *Wildlife* magazine named him the World's Most Inspiring Politician.

In the federal Parliament, as leader of the Australian Greens, Brown continued environmental advocacy and, most relevant presently, strongly opposed the RFA regime and RFA exceptionalism.[90] For example, Senator Brown had criticised the Tasmanian RFA since its 1997 signing, RFA exemptions in the EPBC Bill (opposing

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[87] *Booth v Bosworth* (2001) 117 LGERA 168 ('*Flying Foxes Case*'); [2000] FCA 1878.
[88] Ibid per Spender J at para 5.
[89] Chris McGrath, 'Casenote: Booth v Boswell' (2001) 18 *Environmental and Planning Law Journal* 23 at 24-25.
[90] Brown summarised this episode and the federal RFA regime in Bob Brown, '*Matters of Public Interest Speech*', *Senate, Australian Parliament*, 29 August 2003 extracted in Friends of the Blue Tier, *Short History of Tasmanian Politics: Bob Brown on Labor and the Greens* <http://www.bluetier.org/articles3/brown.htm>.

the Bill and its replacement of predecessor environmental legislation in the Senate on that and other grounds). He also opposed passage of the RFA Act.

Therefore, Senator Brown's standing as an 'interested person', entitled to seek injunctive relief under the EPBC Act, was, appropriately, not disputed when he brought his *Wielangta* application.[91] More note-worthy was that Brown was prepared to take on such a case as an individual applicant, given the risks that carried for him. Senator Brown had previously been a *defendant* in legal proceedings, both:

- criminally (eg gaoled for protesting during the Franklin Dam blockade and arrested twice in the Tarkine);[92] and
- civilly, having been one of twenty sued (unsuccessfully) by Gunns Limited as part of its 'Gunns20' litigation).[93]

However, he was now *voluntarily* stepping into the legal arena as an *applicant* for injunctive relief, challenging Forestry Tasmania. He was placing at risk his personal assets and, in the event of bankruptcy due to legal costs, his Senate seat.[94]

6.5.3 The Respondent, Forestry Tasmania

As the trial judge noted, 'Forestry Tasmania is a corporation established under the *Forestry Act 1920* (Tas). It has extensive functions, including the exclusive management and control of all State forest in Tasmania.'[95] This is something of an understatement. The functions granted to Forestry Tasmania by its enabling statute extend beyond exclusive management and control of all State forest and all

[91] *Forestry Tasmania v Brown* (2007) 167 FCR 34, [5].
[92] Rob White, 'The Right to Dissent: the Gunns 20 Legal Case' in Fred Gale (ed), *Pulp Friction in Tasmania*, (Pencil Pine Press, Launceston, 2011) 79-100; Friends of Forests, above n 90.
[93] Friends of Forests and Free Speech, *The Defendants* <http://www.gunns20.org/node/74#bob>.
[94] See thesis section 6.5.17.
[95] Ibid [6].

associated: forest products; forest operations; permits; licences; forest leases and other occupation rights.[96]

Forestry Tasmania's functions also include (in addition to many other functions),[97] the development, control and delivery of *policies* governing: land use for State forest; sustainable forest management; wood production;[98] and its commercial operations.[99]

Thus, Forestry Tasmania enjoys monopolistic control not only of all Tasmanian State forest and its management, but also the development, control and delivery of related land use and other *policies* (the latter more traditionally a function of a department within Government than a corporatized government business enterprise (GBE)). This is an historical legacy of Forestry Tasmania's origins, the statutory corporation being established when its predecessor, the Forestry Commission, was corporatized. Arguably, its extensive functions (some of which potentially conflict, or at least compete) and associated powers centralise too much power in the hands of Forestry Tasmania, placing it in a parallel position to the HEC of old[100] (before the latter was disaggregated into separate generation, transmission, and retail entities).

Senator Brown is one of Forestry Tasmania's long-time critics, disagreeing with it on policy, and also pointing, for example, to how well the forest industry has been represented in the senior ranks of Tasmanian government.[101] Subsequently, for example, during the Premiership of Paul Lennon (a former Forests Minister), long time Managing Director of Forestry Tasmania, Evan Rolley, became Secretary of the

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[96] *Forestry Act 1920* (Tas) s 8(c).
[97] *Forestry Act 1920* (Tas) ss 8(d)-(h).
[98] *Forestry Act 1920* (Tas) s 8(a).
[99] *Forestry Act 1920* (Tas) s 8(b). The extent of these functions are criticised in Justice Pierre Slicer et al, 'An Open Letter to Tasmanian Politicians on the Governance of Tasmania's Timber Industry', *The Mercury* 16 March 2010 cited in Sue Neales, 'Push for New Forestry Rules', *The Mercury (online)* 16 March 2010 <http://www.themercury.com.au/article/2010/03/16/134141_most-popular-stories.html>. The author of this thesis compiled the cited extract of, and was spokesperson for, the open letter, a link to which accompanies Sue Neales' report above.
[100] Friends of the Forests, above n 90.
[101] Ibid.

Department of Premier and Cabinet (he is now CEO of Ta Ann Tasmania). Mr Rolley was replaced as Forestry Tasmania Managing Director by Bob Gordon, previously head of the Lennon Government's Pulp Mill Taskforce,[102] and formerly a State Labor candidate in Denison. Thus, it could be argued that the pre-eminence of Tasmania's hydro-industrial complex[103] has been overtaken by a forestry-industrial complex. Certainly, Forestry Tasmania enjoyed bipartisan political support from the State's two major political parties.

Thus, in challenging Forestry Tasmania legally (as distinct from politically), Senator Brown was taking on a powerful adversary with extensive statutory functions, which managed Wielangta State Forest, and was well-resourced with relevant expertise, including its own forestry scientists, to act as expert witnesses.

6.5.4 Interveners: The Tasmanian and Australian Governments

The State of Tasmania and Commonwealth of Australia, the parties to the TRFA (the legal status, and Forestry Tasmania's which was a key case could turn), were permitted to intervene in the proceedings on certain issues, contained in .[104] While separately instructed and represented, in effective they joined Forestry Tasmania in opposing most grounds of Senator Brown's application.

6.5.5 Key Findings of Trial Judgment

In the *Wielangta Case*,[105] Bob Brown sought an injunction, pursuant to EPBC Act s 475(1)(b),[106] against Forestry Tasmania. Senator Brown's test case considered how

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[102] See the next chapter.
[103] Bob Burton, 'Wilderness and Unreasonable People' in Cassandra Pybus and Richard Flanagan (ed), *The Rest of the World is Watching* (Pan McMillan, 1990) 79.
[104] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34, [7], Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008).
[105] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34, Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008).
[106] *Forestry Tasmania v Brown* (2007) 167 FCR 34, [4].

logging proposed for two forestry coupes in the Wielangta forest on Tasmania's East Coast would impact three endangered species, namely the:

- swift parrot which migrates across Bass Strait to nest and breed along Tasmania's east coast;
- iconic Tasmanian wedge-tailed eagle (Australia's largest bird of prey, a separate sub-species from mainland Australia); and
- broad-toothed stag beetle, one of Tasmania's rarest animals.[107]

After a 33 day trial involving many expert witnesses, the trial judge found that Forestry Tasmania's operations:

- ' are likely to have a significant impact on all three species, having regard to their endangered status and all other threats to them'[108] (contrary to EPBC Act s 18(3)); and
- had not and would not be carried out in accordance with the Tasmanian RFA[109] (as required by EPBC Act s 38 and RFA Act s 6(4) to gain exemption from the EPBC Act).

Justice Marshall was satisfied of the latter point due to Forestry Tasmania's failure to meet commitments in the Tasmanian RFA cl 68 which provided, under the heading 'Protection of Priority Species':

> The State agrees to protect the Priority Species listed in Attachment 2 (Part A) through the CAR [Comprehensive Adequate and Representative] Reserve System or by applying relevant management prescriptions.[110]

[107] Ibid [10]-[16].
[108] Ibid [8].
[109] Ibid [10].
[110] Ibid [186].

The three species in question were Priority Species listed in Attachment 2 (Part A) of the TRFA. Numerous species were individually set out therein, comprising Tasmanian forest associated species listed in the Schedule of the *Endangered Species Protection Act 1995* (Cth) (one of the predecessor statutes to the EPBC Act) or the *Threatened Species Protection Act 1995* (Tas).

Justice Marshall held that

> Clause 68 has not been complied with and, in all likelihood, will not be complied with in the future because the CAR Reserve System and relevant management prescriptions ... do not and will not protect the relevant species.[111]

It followed that the forestry operations were not 'undertaken in accordance with an RFA' as required by EPBC Act s 38 and RFA Act s 6(4), and hence were not exempted from the EPBC Act by those sections.

Given that, and the forestry operations being in breach of EPBC Act s 18(3), His Honour ordered an injunction restraining operations in the two coupes upon which Senator Brown's application was based.[112]

6.5.6 Meaning of 'provide for' and Inadequacy Thereof

The one issue on which Marshall J found against Senator Brown related to the argument that the TRFA was not an 'RFA' within the meaning of the RFA Act. This issue turned on the legal meaning of the words 'provide for' in the definition of 'RFA'. These words are important not only for this issue: they also preface, for example, the ss 3(1)(a) and 3(1)(ca) objects of the EPBC Act, set out in Chapter 2.

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[111] Ibid [287].
[112] Ibid. For further details see Bleyer, above n 25-30. For example, the trial judge also criticised some Forestry Tasmania witnesses for their manipulation of evidence: See, eg, *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34 (but not on the evidentiary points) [132], [161].

EPBC Act ss 38-42 adopt the RFA Act meaning of 'RFA'.[113] The RFA Act s 4 defines an RFA as an agreement in force between the Commonwealth and a State in respect of a region or regions and which satisfies certain conditions, relevantly including:

> (b) the agreement provides for a comprehensive, adequate and representative reserve system; and
>
> (c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions ...

Senator Brown submitted that the TRFA did not meet the preconditions contained in subparagraphs (b) and (c) of the above definition of 'RFA'.[114] He argued that the words 'provide for' in subparagraphs (b) and (c) above 'should be construed to mean "requires or establishes" rather than merely "planning towards" a CAR Reserve System or the ecologically sustainable management and use of forested areas."[115]

Justice Marshall rejected this submission, instead accepting that of the Commonwealth which he summarised as follows:

> **The Commonwealth's contentions**
>
> 195 The Commonwealth submits the phrase 'provides for' in the definition of RFA in the RFA Act does not mean 'requires' or 'establishes' in a legally enforceable manner. All that is relevantly required, according to the Commonwealth, is that the RFA establishes a structure or policy framework which facilitates or enables the creation or maintenance of a CAR Reserve System and the implementation of ESFM practices.

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[113] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38(1).
[114] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34 [192].
[115] Ibid.

> 196 The Commonwealth notes the use of 'provides for' instead of 'provide' and refers to dictionary definitions of 'provides for' which emphasise the making of arrangements for, rather than the actual provision of, something.[116]

The Commonwealth and Forestry Tasmania also drew support from a judgment of the Full Court of the Supreme Court of New South Wales which had held there to be 'a great difference between the verb "provide'' and the verb "provide for" ... the former means to give or to make available in fact, while the latter looks to the planning stage alone.'.[117]

Justice Marshall saw no reason to doubt this analysis and accepted the submissions of the Commonwealth and Forestry Tasmania concerning the meaning of 'provides for'.[118] In the context of this meaning, His Honour considered that the TRFA met the definitions contained in subparagraphs (b) and (c) of the definition of 'RFA' in that it 'provides for' a CAR reserve system[119] and ESFM.[120]

On appeal, the Full Court upheld Marshall J's interpretation of 'provide for'.[121]

Given their legal meaning as held above, the words 'provide for' are a weakness in RFA Act s 4 in that they so drastically qualify the remainder of subparagraphs (b) and (c) of the definition of 'RFA'. This renders the requirements of an RFA much less stringent than would the word 'provide' alone. This is particularly important in such a crucial definition as 'RFA', upon which so much turns.

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[116] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34 [195]-[196].
[117] *Stocks and Parkes Investments Pty Ltd v The Minister* [1971] 1 NSWLR 932, 940 quoted in ibid (emphasis in original).
[118] Ibid [198]. See also *Forestry Tasmania v Brown* (2007) 167 FCR 34 [70]-[73].
[119] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34 [199]-[200].
[120] Ibid [203]-[204].
[121] *Forestry Tasmania v Brown* (2007) 167 FCR 34 [70]-[73]. This was the only aspect of the trial judgment with which the Full Court expressly concurred (although its findings rendered it unnecessary to rule on some other aspects of the trial judgment).

The words 'provide for' also preface the fundamental objects of the EPBC Act in ss 3(1)(a) and 3(1)(ca), as set out in Chapter 2. Consequently, they also undermine these object clauses, and thereby, potentially, the protective purposes of the EPBC Act. The ramifications of this were taken up by this author in a submission to a Senate Committee Inquiry into the EPBC Act, which will be discussed in the next chapter but one.

6.5.7 RFA Variation

The *Wielangta Case* trial judgment caused public statements of concern by the Federal Forestry Minister Eric Abetz and Tasmanian Premier Paul Lennon. Negotiations followed between their respective Governments as to their response, without public consultation. On 23 February 2007, before the hearing of the appeal, Prime Minister Howard and Premier Lennon signed into effect a variation to the Tasmanian RFA, replacing, in particular, the key clause 68 upon which the judgment was founded.

Recall that the original cl 68 read:

> The State agrees to protect the Priority Species listed in Attachment A (Part 2) through the CAR Reserve System or by applying relevant management prescriptions.[122]

The Tasmanian RFA variation replaced clause 68. In the new cl 68, the Tasmanian and Australian Governments:

> *agree that* the *CAR Reserve System*, established in accordance with this Agreement, *and the application of management strategies and management prescriptions* developed under Tasmania's Forest Management Systems, *protect rare and threatened flora and fauna species and Forest Communities.*[123]

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[122] Department of Agriculture, *Tasmania: Regional Forest Agreement* (25 June 2009) Australian Government <http://www.daff.gov.au/forestry/policies/rfa/regions/tasmania/rfa>.
[123] Ibid (emphasis added).

This effectively turned the cl 68 requirement 'to protect …' listed threatened forest species into a 'deeming provision' whereby the two parties now agree that all listed species are protected by the TRFA forestry framework.

The TRFA variation thereby struck at the heart of the trial judgment, radically changing cl 68 so as to directly contradict the judgment's findings that three endangered fauna species were not, nor would be, protected at Wielangta Forest (indeed, were likely to be significantly impacted by Forestry Tasmania's forestry operations).[124]

As will be seen, the Full Court, given its interpretation of original cl 68, played down the effect of this variation. However, it proved decisive in the High Court special leave application. The implications of the variation, from substantive and procedural perspectives, will be considered after the following analysis of the Full Court and High Court decisions.

6.5.8 Full Court of the Federal Court ('Full Court')

On appeal, in *Forestry Tasmania v Brown*,[125] the Full Court of the Federal Court unanimously overturned Marshall J's decision.[126] It did so in two main ways. Firstly, the Full Court viewed the statutory regime of RFA exceptionalism more through the lens of the (later in time) RFA Act, than the EPBC Act which Marshall J had favoured. The Full Court focused more on the intent of Parliament, such as expressed in Explanatory Memoranda which had accompanied the two Bills, giving minimal reference to international treaties.

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[124] Details and text of this Tasmanian RFA amendment are available at Department of Agriculture, above n 122; see also <http://www.on-trial.info>, specifically at <http://www.on-trial.info/tasrfa.htm>.
[125] (2007) 167 FCR 34.
[126] *Forestry Tasmania v Brown* (2007) 167 FCR 34 (Sundberg, Finkelstein and Dowsett JJ).

For example, the Full Court quoted the description of what would become EPBC Act s 39 in the Explanatory Memorandum accompanying the Bill.[127] The Court viewed the passage as indicating 'that the Act does not apply to forestry operations in RFA regions, and the way in which the objects of the Act will be met in relation to those operations is to be ascertained by reference to the relevant RFA.'[128]

The Court also cited the Revised Explanatory Memorandum accompanying the Bill that became the RFA Act, specifically in relation to what would become s 6(4). The Court then continued:

> Again, the message is that the Act (ie the *Environmental Protection and Biodiversity Conservation Act*) does not apply to forestry operations in RFA regions, and that the regime applicable in those regions is found in the RFAs themselves.[129]

Interestingly, the Court omitted the requirement that such forestry operations be 'undertaken in accordance with an RFA' – words contained in both EPBC Act s 38(1) and RFA Act s 6(4).

This approach also led the Full Court to over-rule the trial judge's interpretation of the TRFA (prior to the 2007 variation), particularly cl 68 (even) in its *original* form.

In this respect, the *ratio* of the Full Court is succinctly set out at par [59] of the judgment. There, the Full Court summarised the trial judge's reasons for requiring Forestry Tasmania to obtain EPBC Act approval as being:

> because cl 68 of the [T]RFA required the State to in fact protect the three species and CAR does not in fact protect them. The question is whether cl 68 does require the State to protect the species in this way. In our view it does not. Clause 68 does not involve an

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[127] Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1999 (Cth)cl 39 (set out in Ch 3).
[128] *Forestry Tasmania v Brown* (2007) 167 FCR 34, [61].
[129] Ibid, [62].

> enquiry into whether CAR effectively protects the species. Rather it is the establishment and maintenance of the CAR reserves that constitutes the protection.[130]

The Full Court continued:

> The verbiage of cl 68 supports this view. The State does not agree "to protect the priority species listed in Attachment 2 (Part A)". It agrees to protect them "through the CAR Reserve System".[131]

It followed that the original cl 68 required the State only to establish and maintain a CAR Reserve System in the manner described in the RFA.[132]

In support of its interpretation, the Court referred, inter alia, to various clauses of the TRFA, such as cl 50 whereby the parties agreed that the CAR Reserve System, 'as established in accordance with the TRFA, meets the JANIS Reserve Criteria and "sufficiently" protects CAR values, and provides "adequate" protection for wild rivers'.[133] The Full Court's ultimate conclusion rendered it 'unnecessary to examine … the degree of protection provided by CAR to the three species'.[134]. However, given the Full Court's approach to cl 68, analogous reasoning would treat the Governments' agreement in cl 50 as conclusive evidence that Tasmania had done all required of it to establish and maintain a CAR Reserve System, irrespective of any inadequacies of the Reserve System in fact.

The Full Court reached the above conclusions as to the *original* cl 68. It set out (at [80]-[84]), the effect of the RFA variation, noting that the TRFA 'was amended after judgment and before the appeal.'[135] The Full Court said of cl 68 that it 'has been

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[130] Ibid [59].
[131] Ibid [60].
[132] Ibid [60].
[133] Ibid [65].
[134] *Forestry Tasmania v Brown* (2007) 167 FCR 34, [103].
[135] Ibid [69].

amended so that it more clearly says what we think it means in its original form.'[136] The Court later repeated, 'The amendment to cl 68 of the RFA, insofar as it relates to CAR, simply puts in clearer language what we regard as the true meaning of the original clause.'[137] This demonstrates the extent to which the Full Court read down the apparent protective intent of the original cl 68. It also begs the question, why did the Governments need to amend cl 68 rather than await their appeal to the Full Court. Presumably, they would argue, cl 68 was amended to *ensure* that the trial judge's erroneous legal interpretation of it was 'corrected' on appeal.

Thus, in essence, as senior counsel for Forestry Tasmania later told the High Court, Forestry Tasmania 'lost on the facts and on the law at trial; [but] won on the law before the Court of Appeal.'[138] The trial judge held cl 68 to be a promise of protection, and detailed why the CAR Reserve System and management prescriptions did not, and would not, in fact deliver protection. The Full Court held that TRFA cl 68 (both pre and post its variation) *deemed* protection achieved merely by establishing then maintaining the CAR Reserve System (the Court made little reference to management prescriptions). This rendered irrelevant the trial judge's findings as to the CAR reserves' (plus management prescriptions) ineffectiveness in actually protecting the species.

6.5.9 The Full Court's Over-Reliance on CAR Reserves at the Expense of Management Prescriptions

The Full Court expressly held that original cl 68 did *not* require the State to *in fact* protect the endangered species, since Tasmania had not agreed 'to protect the Priority Species', but rather, agreed to protect them 'though the CAR Reserve System'.[139]

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[136] Ibid.
[137] Ibid [69], [92].
[138] Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008) 14.
[139] Ibid [59]-[60].

Note the Full Court's omission (at [59] and throughout its judgment, save three sentences)[140] of the alternative protective mechanism stated in cl 68, namely 'by applying relevant management prescriptions.' The Full Court's failure to address in any meaningful way this 'second limb' of cl 68 (present in both the original and substituted clause 68), is a fundamental oversight for multiple reasons.

Firstly, the existence of management prescriptions as an alternative to CAR Reserves in cl 68 is an implicit acknowledgement in the TRFA that CAR Reserves alone will not protect some species from impacts by forestry. For example, species reliant on habitat mainly outside the reserves, (which, by definition, is where forestry occurs) require off-reserve conservation measures, such as forestry management prescriptions. Hence, after acknowledging Tasmania's extensive reserve system, the FPA states (to this day):

> However, it is well recognised that reservation alone will not achieve the conservation of all biodiversity and maintain the natural values of Tasmania. Our state is no different to other parts of Australia in having a long list of species threatened by human activities and other threatening processes. Reservation needs to be combined with conservation management outside of reserves.[141]

This widely accepted science, implicit in the wording of TRFA clauses such as cl 68, was not recognised, nor even acknowledged, by the Full Court.

Secondly, international conventions such as the *Apia Convention* oblige State Parties such as Australia to, inter alia:

> … *in addition to the protection given to indigenous fauna and flora in protected areas*, use their best endeavours to *protect* such fauna and flora (special attention being given to *migratory species*) so as to *safeguard* them from unwise

[140] Ibid [19],[68].
[141] Forest Practices Authority, *Biodiversity Program* (19 June) <http://www.fpa.tas.gov.au/the_fpa/programs/biodiversity_program>.

> exploitation and other threats that may lead to their extinction. *[emphasis added]*[142]

This requirement, being 'in addition to the protection given to [native species] in protected areas' (eg CAR reserves), makes off-reserve protection an obligation under the *Apia Convention*.. As this treaty is incorporated in Australian law by the EPBC Act, it is relevant to judicial interpretation of the Act.[143]

Thirdly, the above two points were incorporated within the trial judgment, but not expressly dealt with by the Full Court. Hence, examination of management prescriptions was a crucial part of the expert scientific evidence at trial (Marshall J concluded that CAR reserves plus management prescriptions were inadequate) Similarly, the trial judge referred to the *Apia Convention* and noted the consistency of his interpretation and application of the domestic law with international treaties (while correctly basing his judgment on domestic, rather than international law). However, both these aspects of the trial judgment were omitted in the Full Court's summary of the trial judgment and its *ratio*.[144].

Thus, the Full Court apparently overlooked (and thereby effectively removed) any RFA requirement for application of management prescriptions.[145] The implications of this judgment are discussed further below, after 6.5.10, the High Court's decision.

6.5.10 High Court of Australia

Senator Brown applied for special leave to appeal, the first such application to be brought under the EPBC Act or in relation to RFA Act. The High Court refused

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[142] *Convention on Conservation of Nature in the South Pacific*, opened for signature 12 June 1976, [1990] ATS 41 (entered into force 26 June 1990).
[143] In the interpretation of a provision of an Act, material that may be considered includes 'any treaty or other international agreement that is referred to in the Act': *Acts Interpretation Act 1902* (Cth) s 15AB(2)(d).
[144] *Forestry Tasmania v Brown* (2007) 167 FCR 34, [59].
[145] See further Sivayoganathan, above n 21-28.

special leave (by 2-1 majority, Kirby J dissenting), due to the variation of the Tasmanian RFA cl 68.[146] Giving the High Court's reasons, orally, Hayne J quoted the original clause 68, then stated:

> ….The applicant contended and the respondent denied that in order to meet that requirement it was necessary to show that the relevant CAR Reserve System or the relevant management prescriptions protected the priority species referred to. The respondent asserted and the applicant denied that implementation of the system, or the prescriptions, was the agreed method of protecting the relevant species and that it was neither necessary nor appropriate to embark upon an inquiry about their efficacy.
>
> The Full Court of the Federal Court accepted the respondent's argument. It is not necessary for us to decide whether the Full Court was right to do that. In particular, it is not necessary to consider whether the construction of clause 68 in the form it took in 1997, which was adopted by the Full Court, is a construction that takes sufficient account of the purposes of the legislation for which and under which the agreement was made.
>
> In 2007 the 1997 agreement was varied and a new clause 68 agreed. The new clause provided that, "The Parties agree that the CAR Reserve System, established in accordance with this Agreement, and the application of management strategies and management prescriptions developed under Tasmania's Forest Management Systems, protect rare and threatened fauna and flora species and Forest Communities".
>
> … having regard to the terms of the substituted clause 68 of the relevant regional forestry agreement, an appeal to this Court against the decision of the Full Court to dissolve the injunction that had been granted at first instance would enjoy insufficient prospects of success to warrant a grant of special leave to appeal..[147]

Due to the TRFA variation replacing cl 68 with new wording, Hayne J said 'It is not necessary for us to decide whether the Full Court was right to [accept Forestry

[146] Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008).
[147] Ibid 766-801 (Hayne J).

Tasmania's argument]'.[148] His Honour then went a step further, adding that it was unnecessary to consider whether the Full Court's construction of the original cl 68 'is a construction that takes sufficient account of the purposes of the legislation for which and under which the agreement was made.'[149] This additional sentence can be interpreted in two ways. It may simply be an acknowledgement of a key ground of Brown's argument. Alternatively, it may constitute a veiled criticism of the Full Court, perhaps raising some doubt (albeit only in *obiter* given the High Court did not need to decide the point) as to whether the Full Court's interpretation of cl 68 took sufficient account of the objects of the Act 'for which and under which the agreement [the Tasmanian RFA] was made' (ie the RFA Act).[150] This will be considered further below at 6.5.13.

6.5.11 Resultant Legal Position

The High Court majority decided that the variation to the Tasmanian RFA following the trial judgment, in particular the substituted cl 68, left Senator Brown with insufficient prospects of success to warrant the Court granting him special leave to appeal.[151] The majority therefore refused special leave (and the dissenting Kirby J has since retired from the High Court). Consequently, the legal position is that of the TRFA, as varied in 2007, as interpreted by the Full Court of the Federal Court.

The net result is to nullify any meaningful obligation for RFA forestry operations to in fact protect threatened species, since the Full Court held that even original cl 68 did not require this. Amended cl 68 now makes this result more certain, by deeming all such 'Priority Species' to be protected.

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[148] Ibid 775-776 (Hayne J).
[149] Ibid 776-9 (Hayne J).
[150] Ibid.
[151] Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008).

Presumably, even if a Priority Species became extinct, the legal fiction of its deemed protection would continue in law, demonstrating the absurdity of the position. So much was suggested by DAFF in answers to a Senate Committee inquiring into the EPBC Act in 2009.[152]

6.5.12 Critique of Judgments and Resultant Legal Position

6.5.12.1 The Device of Deeming in new RFA cl 68 that Threatened Species are Protected

Having read down the requirements of original cl 68 in the manner described at 6.5.8, the Full Court decided that an RFA (eg TRFA cl 50, 61 and 68) can successfully satisfy key conditions in the definition of 'RFA' by adopting 'the device' of having the parties *agree* that the RFA regime achieves key protective requirements of an RFA. This device or deeming approach (as in substituted cl 68), rather than promising something (as in original cl 68), let alone actually achieving an outcome *in fact*, leaves very little substance legally required of an RFA.

Recall that TRFA cl 68 in its original form stated:

> 'The State agrees to protect the Priority Species listed in Attachment 2 (Part A) through the CAR Reserve System or by applying relevant management prescriptions.'

The TRFA variation replaced this with substituted cl 68 by which, in the Full Court's words, 'the parties agreed that CAR protected rare and threatened species.'[153] The Court stated:

> The amendment to cl 68 of the RFA, insofar as it relates to CAR, simply puts in clearer language what we regard as the true meaning of the original clause. There are different ways in which this clarification could have been achieved. The way we have put it is to

[152] See the chapter after next.
[153] Ibid [95].

> say that CAR affords the protection to the Priority Species. The drafting of the amendment adopts the device used elsewhere in the RFA, for example in cl 50, of having the parties agree that it affords that protection. The effect is the same. Accordingly the RFA continues to "*provide for*" the ecologically sustainable management and use of the forested areas in Tasmania.[154]

The Full Court's final sentence above is a reference to subparagraph (c) of the definition of 'RFA' in RFA Act s 4. That subparagraph requires that an RFA provides for 'the ecologically sustainable management and use of the forested areas in the region or regions'. However, the Court's reasoning in the above paragraph is highly problematic for multiple reasons.

Firstly, the Full Court had earlier set out TRFA cl 62, as follows:

> Clause 62 is headed "Ecologically Sustainable Forest Management (ESFM)" and provides:
>
> *"The parties agree that ESFM is an objective which requires a long term commitment to continuous improvement and that the key elements for achieving it are:*
>
> - *the establishment of the CAR Reserve System;*
> - *…; and*
> - *the establishment of fully integrated and strategic forest management systems capable of responding to new information."*[155]

The key elements of ESFM therefore go beyond merely establishing a CAR Reserve System, which the Full Court appeared to suggest was sufficient to provide for both CAR Reserve System and ESFM.

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[154] Ibid [92].
[155] Ibid [39].

Subparagraph (c) is only one of five conditions in the definition of 'RFA' and the Court had earlier stated that '[t]o be an RFA an agreement must satisfy all five conditions in the definition.'[156]

The previous condition in subparagraph (b) requires that an RFA provide for a CAR Reserve System. Yet the Full Court's statement quoted above suggests that the parties' agreement as to the CAR Reserve System satisfies not only subparagraph (b), but also subparagraph (c) of the definition of 'RFA' in RFA Act s 4.

The Court appears to be saying that because by new cl 68, 'the parties agreed that CAR protected rare and threatened species',[157] the TRFA thereby fulfils both subparagraphs (b) and (c) of the definition of 'RFA' in RFA Act s 4.

This is reminiscent of the Full Court's apparent conflation of CAR with management prescriptions when it determined that, by the original cl 68,

> The State does not agree "to protect the priority species …". It agrees to protect them "through the CAR Reserve System".[158]

This was despite cl 68 actually stating:

> The State agrees to protect the Priority Species listed in Attachment 2 (Part A) through the CAR Reserve System *or by applying relevant management prescriptions.*[159]

The Full Court's reasoning and decision gave the latter emphasised phrase no work to do, rendering it otiose. Yet the reference in cl 68 to management prescriptions as an alternative mechanism through which protection might be achieved is an implicit acknowledgement that the CAR Reserve System does not protect all threatened species (eg not those dependent on habitat outside the reserve system). Yet, despite

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[156] Ibid [71].
[157] Ibid [95].
[158] Ibid [60].
[159] Commonwealth of Australia and the State of Tasmania, *Tasmanian Regional Forest Agreement 1997* <http://www.daff.gov.au/forestry/policies/rfa/regions/tasmania> (TRFA) cl 68 (emphasis added).

the trial judge expressly finding just such a limitation of the Tasmanian reserve system,[160] this distinction between the functions of a CAR Reserve System (where forestry operations are not permitted) and management prescriptions (required where they are) appeared lost on the Full Court, the judgment of which studiously ignored management prescriptions except for three sentences. The Court therefore concluded that 'CAR' alone sufficed. This is nonsense in terms of:

- expert scientific evidence led by Forestry Tasmania and recorded in the trial judgment;[161]
- statutory interpretation (applying either the literal or purposive approach);[162] and
- Australia's international obligations (recall the *Apia Convention* 1976 requirement of protection *in addition to* protected areas)[163]

As to the latter, Marshall J, at the very end of his judgment had quoted the High Court in *Minister for Immigration and Ethnic Affairs v* Teoh[164] to the effect that as far as the language of legislation permits, it ought be construed and applied so that it 'is in conformity and not in conflict' with Australia's international obligations.[165]

Even if the Full Court was right that original cl 68 imposed no obligation to protect *in fact*, its sole reliance on CAR went further, relieving the State of its promise to apply relevant management prescriptions (to protect Priority Species). Needless to say, this has a drastic impact for the federal Government's legal capacity to enforce any protection of threatened species when forestry operations are undertaken (which

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[160] See *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34.
[161] See below at 6.5.14.
[162] See below at 6.5.13.
[163] See above at 6.2.1 and further discussion below at 6.5.15.
[164] (1995) 183 CLR 273.
[165] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 quoted in *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34 [301].

only occurs outside reserves. Implications are discussed below for threatened species at 6.5.14 and Australia's international obligations at 6.5.15.

6.5.12.2 What is Required to meet the Definition of an 'RFA'?

The trial judgment and the Full Court's judgment (particularly insofar as the latter applied to the TRFA variation and its substituted cl 68) set a very low bar for an RFA to meet the definition of 'RFA' in the RFA Act s 4, a meaning adopted by EPBC Act s 38(2). This can be seen through the Full Court's rulings on the issue of whether the TRFA met the conditions of an 'RFA', defined in the RFA Act s 4 as follows:

> ***RFA*** or ***Regional Forest Agreement*** means an agreement that is in force between the Commonwealth and a State in respect of a region or regions, being an agreement that satisfies all the following conditions:
>
> (a) the agreement was entered into having regard to assessments of the following matters that are relevant to the region or regions:
>
> (i) environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values;
>
> (ii) indigenous heritage values;
>
> (iii) economic values of forested areas and forest industries;
>
> (iv) social values (including community needs);
>
> (v) principles of ecologically sustainable management;
>
> (b) the agreement provides for a comprehensive, adequate and representative reserve system;
>
> (c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions;
>
> (d) the agreement is expressed to be for the purpose of providing long-term stability of forests and forest industries;
>
> (e) the agreement is expressed to be a Regional Forest Agreement.

Clearly, as the Full Court acknowledged, 'To be an RFA an agreement must satisfy all five the conditions in the definition',[166] ie pars (a)-(e) above) are cumulative conditions. In determining whether the TRFA satisfied pars (b) and (c) both the trial judge and Full Court relied on their '… provide for' preface. The legal meaning of 'provide for' and its dilution of phrases following (compared to the word 'provide' alone) has been examined above at 6.5.6.

Before the Full Court, Senator Brown argued that, following the TRFA variation, the TRFA no longer satisfied the following of conditions of the definition of 'RFA' (particulars bracketed below):

> (a) the agreement was entered into having regard to assessments, as relevant to Tasmania, of (i) and (v), ie:
>
> (i) environmental values in respect of endangered species); and
>
> (v) principles of ecologically sustainable management); and
>
> (c) the agreement provides for the ecologically sustainable management and use of the forested areas in Tasmania.[167]

Notwithstanding the terms of the TRFA variation, a explained above at 6.5.12.1, the Full Court upheld the TRFA variation as using a legitimate drafting device in substituted cl 68 to 'simply put in clearer language what we regard as the true meaning of the original clause',[168] ie (in the words of the Full Court), 'to say that CAR affords the protection to the Priority Species.'[169] The Court noted that the same device was used elsewhere in the TRFA, eg cl 50, to similar effect.[170] The Court then

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[166] *Forestry Tasmania v Brown* (2007) 167 FCR 34 [71].
[167] Ibid [85] citing Brown's amended notice of contention.
[168] *Forestry Tasmania v Brown* (2007) 167 FCR 34 [92].
[169] Ibid.
[170] Ibid.

simply stated, 'Accordingly, the [T]RFA continues to "*provide for*" the ecologically sustainable management and use of the forested areas in Tasmania.'[171]

TRFA cl 96 originally read:

> The State agrees that any changes to the Priority Species in Attachment 2 including new or altered management prescriptions developed over the term of the Agreement will:
>
> (a) be adequate to maintain the species identified;
>
> (b) ….[172]

The 2007 TRFA variation made only minor changes to the introductory words but replaced cl 96 par (a) with:

> (a) provide for the maintenance of the relevant species ….

The Full Court opined that 'The changes to cl 96 are cosmetic only and do not result in the agreement ceasing to satisfy par (c) [of the definition of 'RFA' in RFA Act s 4].'[173] Yet clearly, the changes to par (a), replacing the commitment to adequacy with 'provide for', take advantage of meaning of the latter words as applied in the trial judgment which led to the TRFA variation. In that context, this change to par (a) was far more than cosmetic. It deliberately weakened the immediately following requirement regarding 'the maintenance of the relevant species', now reduced to requiring a framework, deprived of the standard of adequacy. The fact that new cl 96 par (a) still satisfied par (c) of the definition of 'RFA' in RFA Act s 4 says more about the weakness of the latter; the former has undoubtedly been deliberately watered down by replacing adequacy with 'provide for'.

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[171] Ibid.
[172] Ibid [82].
[173] Ibid [93].

6.5.12.3 '[T]he TRFA is [an RFA] [because] the RFA Act says it is …'[174]

As explained above The Full Court, 'dealt in [70] to [77] with the principal argument that was put to [it], namely that the RFA is a regional forest agreement only if it satisfies the five conditions in the definition.'[175] However, it then stated, 'the RFA is a regional forest agreement for a more basic reason: the RFA Act says it is a regional forest agreement.'[176]

The Court noted the RFA Act's definition of 'RFA' and then its definition of 'RFA forestry operation'. The latter referred to forestry operations as defined in the RFAs, each between the Commonwealth and one of four States. The relevant part of the definition of 'RFA forestry operation' referring to the TRFA read:

> forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Tasmania) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA).[177]

The Court stated:

> [T]hat definition identifies an agreement that Parliament treats as an RFA within the definition of regional forest agreement. Having regard to the adjacent definitions of "RFA or Regional Forest Agreement" and "RFA forestry operations" in s 4 of the RFA Act, it not a sensible reading of the provisions to treat Parliament as saying that an existing agreement, in the form it took on 1 September 2001, and which it thrice describes as an RFA, is in truth something that may or may not be one.

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[174] *Forestry Tasmania v Brown* (2007) 167 FCR 34 [78].
[175] Ibid [78].
[176] Ibid.
[177] *Regional Forest Agreements Act 2002* (Cth) s 4 (definition of 'RFA forestry operation'), quoted in *Forestry Tasmania v Brown* (2007) 167 FCR 34 [79].

The Court later noted that the TRFA had been entered into in 1997, and then subsequently amended by agreement (under cl 9) from time to time.[178] It stated that 'These amendments did not result in the agreement having been "entered into" afresh on each occasion.'[179] This suggests the Court's reference to the TRFA 'in the form it took on 1 September 2001' ought not be taken as implying that the TRFA amendments stopped the TRFA from being an 'RFA' for the purposes of the RFA Act by virtue of the RFA Act describing and treating it as such.

The RFA Act refers similarly to each of the RFAs so the Full Court's reasoning logically extends to each of them. The Court appears to have ruled that the RFA Act, by describing the RFAs as such in its definition of 'RFA forestry operation', overrode the content conditions apparently required by the definition of 'RFA'. This may render those content conditions otiose.

The Full Court's reasoning suggests that the RFAs can, through variation upon agreement of the parties, be watered down without impugning their legal status as RFAs, even if they no longer meet the five conditions which the RFA Act's definition of RFA says are all cumulative conditions to be satisfied. If so, it seems these 'conditions' in the definition of RFA are unenforceable (if they are even binding) and so there is no statutory safeguard imposing minimum conditions circumscribing the parties' choice(s) of variations to the *existing* RFAs described as such in the RFA Act.

These RFAs are long lived (eg the TRFA has a term of 20 years: cl 7) and can provide for their duration to be extended (eg TRFA cl 8). So theoretically they can live on through repeated extensions, apparently in perpetuity. Even if the RFA lapsed, EPBC s 40 could allow forestry operations to remain EPBC Act exempt in the 'RFA region', which in Tasmania's case is the entire State.

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[178] Ibid [94].
[179] Ibid.

6.5.13 The Need for a Purposive Interpretive Approach?

As noted at the end of 6.5.10, while refusing Brown special leave to appeal to the High Court, the *obiter* comments of Hayne J nevertheless raise questions as to whether the Full Court's construction of cl 68 in its original form adequately accounted for the purposes of its enabling statute.

The requirement to take account of a statute's purpose or objects is governed by *Acts Interpretation Act 1902* (Cth) s 15AA (set out earlier). The *Acts Interpretation Act 1902* (Cth) applies to the TRFA even though it is not an Act[180] (and despite the TRFA being executed in 1997, pre-dating both the EPBC Act and the RFA Act).

Church points to s 15AA, but then argues that in construing cl 68 the Full Court failed to take into account the purposes of the EPBC Act.[181] The relevant statute for this purpose, is not the EPBC Act. The High Court noted that RFA Act provides for the making of RFAs.[182] Accordingly, to the extent that the Full Court should have considered the purposes of an enabling statute in interpreting the TRFA, it would be the RFA Act, rather than the EPBC Act.

Similar criticism could perhaps be levelled at aspects of the trial judgment of Marshall J, to the extent that in approaching the EPBC Act ss 38-42 RFA exemption from the context of the EPBC Act, he arguably interpreted the TRFA through the lens of the EPBC Act rather than RFA Act. After explaining his approach to construction of the EPBC Act as informed by relevant conventions implemented by that Act, Marshall J stated that EPBC Act s 18(3) 'must be seen in the context of an Act and Conventions which underlie the promotion of recovery of threatened

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[180] *Acts Interpretation Act 1902* (Cth) s 46(1)(a) applies that Act to the construction of non-legislative instruments and their provisions; and s 46(1)(c) requires that any such instrument be 'read and construed subject to the enabling legislation'. *Acts Interpretation Act 1902* (Cth) s 46 has a parallel, in relation to legislative instruments, in *Legislative Instruments Act 2003* (Cth)s 13.
[181] Church, above n , 134-6.
[182] Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008) 745-6 (Hayne J).

species.'[183] This is eminently reasonable, in so far as it goes, given that EPBC Act s 3(2)(e)(i) says the Act includes provisions to, inter alia, 'promote the recovery of, threatened species'. However, His Honour then added, 'Similarly, the exemption for RFA forestry operations in s 38 of the EPBC Act must be seen, in context, as providing an exception only if an alternative means of promoting the recovery of a species is achieved by a Regional Forestry Agreement.'[184] This approach interprets EPBC Act s 38 through the EPBC Act lens seeing it as allowing the RFAs to provide an alternative means of fulfilling EPBC Act objects in RFA forestry regions. To then construe not only the EPBC Act, but then also, arguably, the TRFA cl 68, through this lens, may have been a bridge too far if that conflicted with the objects of the RFA Act. Certainly, the High Court's phraseology suggests the relevant statutory objects are those of the RFA Act.

The Full Court interpreted the TRFA much more through the lens of the RFA regime than the EPBC Act. It also accepted Marshall J's finding as to the meaning of 'provide for' in the RFA objects.[185] Since 'provide for' was not examined by the High Court, the Full Court's approach to that issue of interpretation stands. This prevents the RFA Act's objects from imposing too strong an obligation as to the contents of RFA's, perhaps giving legal support to the Full Court's finding that it was 'unnecessary to examine … the degree of protection provided by CAR to the three species'.[186]

Given the High Court's refusal of special leave, the Full Court judgment stands. For reasons further explained below, this leaves in peril both forest-dependent threatened species and Australia's compliance with its relevant international obligations.

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[183] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34, [301].
[184] Ibid.
[185] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, [197]-[198] (Marshall J), revd (2007) 167 FCR 34, [70]-[73].
[186] *Forestry Tasmania v* (2007) 167 FCR 34, [103].

6.5.14 H1: Implications for Threatened Species Protection

The Full Court decision requires no additional protection beyond the CAR Reserve System, notwithstanding the trial judgement's specific evidence-based findings in respect of each species demonstrating that the CAR Reserve System (and relevant management prescriptions) had not protected them.

For example, Marshall J had specifically stated of the migratory swift parrot:

> **Has the State protected the parrot through the CAR Reserve System?**
>
> 263 [Expert witnesses for both parties] accepted, that the CAR Reserve System may assist in the survival of the parrot but is unlikely to assist in the recovery of this species in isolation. In other words, more is required by way of management prescriptions.
>
> 264 Protection is not delivered if one merely assists a species to survive. Protection is only effective if it not only helps a species to survive, but aids in its recovery to a level at which it may no longer be considered to be threatened. Whatever protection may be provided to the parrot by the CAR Reserve System is minimal, as the evidence discloses that only a small part of the parrot population is likely to use the CAR reserves which are too small to be of any real assistance to the parrot.[187]

Justice Marshall then cited Exhibit AV, a paper co-authored by two of Forestry Tasmania expert witnesses, stating that the CAR Reserve System was inadequate by itself:

> to retain the hollow reserve for maintenance of populations of hollow dependant fauna across their range, and *highlights the importance of effective "off reserve" management prescriptions to complement the reserve system*.[188]

Notwithstanding all the above in the trial judgment, the Full Court was satisfied that

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[187] *Brown v Forestry Tasmania* (2006) 157 FCR 1, [263]-[264], revd (2007) 167 FCR 34.
[188] Ibid [265] (emphasis added).

mere establishment and maintenance of CAR reserves fulfilled RFA obligations, regardless of 'whether CAR effectively protects the species'.[189] This alleviates any RFA requirement for the off reserve management prescriptions, the importance of which was apparent from each of:

- Exhibit AV co-authored by two of Forestry Tasmania's expert witnesses;[190]
- the trial judgement, including quoting exhibit AV;[191]
- the TRFA cl 68 (in both original and substituted form); and
- the *Apia Convention*.[192]

Implications for the swift parrot[193] of the Full Court's reliance on the CAR Reserve System can also be drawn from expert material not cited in the trial judgment, eg ANU's Professor David Lindenmayer's chapter of an edited book published by the Academy of Social Sciences in Australia on behalf of the National Academies Forum:

> The case of conservation of the Swift Parrot at Recherche Bay is particularly important because the long-term conservation of the species depends almost entirely on management actions outside large ecological reserves. Indeed, it has been estimated that less than two percent of the nesting habitat of the species occurs in dedicated conservation reserves with the rest on private and publicly-owned production forests.[194]

Professor Lindenmayer was writing in the context of Recherche Bay, adjoining the

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[189] *Forestry Tasmania v Brown* (2007) 167 FCR 34 [59].
[190] *Brown v Forestry Tasmania* (2006) 157 FCR 1, [265], revd (2007) 167 FCR 34.
[191] Ibid, [264]-[266], revd (2007) 167 FCR 34.
[192] *Convention on Conservation of Nature in the South Pacific*, opened for signature 12 June 1976, [1990] ATS 41 (entered into force 26 June 1990); see above at 6.5.9.
[193] As to swift parrots, see further *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34 [138]-[163]. Justice Marshall accepted expert evidence that 'Wielangta is the site of more than 20% of all recorded Swift Parrot nests': ibid [150].
[194] David Lindenmayer, 'The Conservation and Management of Ecological Communities' in John Mulvaney and Hugh Tyndale-Biscoe (eds), *Rediscovering Recherche Bay* (Academy of the Social Sciences in Australia 2007) 145, 152 (citations omitted).

large reserve of the TWWHA. Wielangta, largely zoned production forest, contains a crucial island of habitat on the swift parrot's migratory flight path, before it can reach the relative safety of Recherche Bay and the adjacent TWWHA. The importance of applying off reserve management prescriptions there was acknowledged by the trial judge after over 30 days of trial including a site visit and overwhelming expert evidence. The Full Court in its reliance on CAR Reserves, misconstrued the TRFA scheme, and arguably the law. But in the wake of the TRFA variation and the High Court's consequent refusal of special leave, the unanimous Full Court decision stands, in conjunction with the variation, at the expense of the parrot, the eagle and the beetle.

Given the EPBC Act protection these species would enjoy but for the s 38 exemption, this result is decisive evidence for the rejection of H1.

6.5.15 H2: Implications for International Obligations

In terms of H2, the Full Court's determination that merely having a CAR Reserve System (regardless of its efficacy) was sufficient to deem protection under the Tasmanian RFA cl 68 seems directly at odds with Australia's off-reserve protective obligations under at least the *Apia Convention*, eg:

> 1. … *in addition to the protection given to indigenous fauna and flora in protected areas*, use their best endeavours to *protect* such fauna and flora (special attention being given to *migratory species*) so as to *safeguard* them from unwise exploitation and other threats that may lead to their extinction. *[emphasis added]*[195]

How this came about is illustrated by the differing approaches of Marshall J and the Full Court to the use of international law. Justice Marshall explained his approach to construction of the EPBC Act at the end of his judgment[196]. This included that

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[195] *Convention on Conservation of Nature in the South Pacific*, opened for signature 12 June 1976, [1990] ATS 41 (entered into force 26 June 1990).
[196] *Brown v Forestry Tasmania* (2006) 157 FCR 1, [294]-[301], revd (2007) 167 FCR 34.

'Construction of the EPBC Act is informed by the Conventions which it implements in compliance with Australia's international obligations.'[197] His Honour cited above-mentioned provisions of the *CBD*[198] and *Apia Convention*[199] and the s 139(1)(a) requirement that the Minister not approve actions inconsistently with the Conventions. He then stated:

> Promotion of the conservation of biodiversity, as s 3(1)(c) of the Act requires, in context, can only be achieved by favouring a construction of the Act which views protection of the environment as an act of not merely keeping threatened species alive, but actually restoring their populations so that they cease to be threatened. Section 3(2)(e)(i) says it all when it when it stresses the *promotion of the recovery of threatened species*. … (*emphasis added*)[200]

This s 3(2)(e)(i) phrase derives directly from the *CBD* art 8(f). Accordingly, Marshall J said that the EPBC Act s 18(3) significant impact test and 'the exemption for RFA forestry operations in s 38' must be read in the context of an Act and Conventions requiring 'the promotion of the recovery of threatened species'.[201] His Honour also noted that his approach to statutory interpretation was consistent with that set out in *Minister for Immigration and Ethnic Affairs v Teoh*.[202]

In summarising the trial judgment, the Full Federal Court noted the trial judge's references to 'the *CBD* 1999 [sic] and the Convention on Conservation of Nature in

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[197] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34, [295] (Marshall J).
[198] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).
[199] *Convention on Conservation of Nature in the South Pacific*, opened for signature 12 June 1976, [1990] ATS 41 (entered into force 26 June 1990).
[200] *Brown v Forestry Tasmania* (2006) 157 FCR 1, [300], revd (2007) 167 FCR 34.
[201] Ibid [301].
[202](1995) 183 CLR 273.

the South Pacific 1976'[203] and s 139. It quoted the two paragraphs regarding 'the promotion of the recovery of threatened species', but without mentioning *Teoh*.[204]

Other than reciting s 139,[205] the Full Court made no further comment about the relevance or otherwise of Conventions. Given its ruling as to the legal interpretation of the Tasmanian RFA cl 68, it did not consider Marshall J's reasoning on this point.

Justice Marshall's interpretive approach and reasoning, though not reliant upon international law, was cognisant of and entirely consistent with it. His Honour's approach to interpreting the EPBC Act is consistent with the *Acts Interpretation Act 1901* (Cth) s 15AB which includes, amongst examples of material that may be considered in ascertaining the meaning of a provision of an Act, 'any treaty or other international agreement that is referred to in the Act'.[206] By contrast, the Full Court, seeing no need to engage with Convention obligations (or related case law such as *Teoh*), reached a result directly at odds with such obligations, which now represents current Australian law.

The Australian Government by the TRFA variation divested itself of any pre-existing capacity to effectively regulate forestry in Tasmania through the current TRFA. The *Wielangta Case* outcomes leave it in no position to ensure compliance with international obligations for species protection, and Australia is arguably in breach of them.

6.5.16 Implications for Justifications of RFA exceptionalism

As outlined in Chapter 3, the EPBC Act justifies its RFA exemption provisions by reference to the RFAs. The EPBC Act states that these involve 'protection of the environment *through* agreements between the Commonwealth and the relevant State

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[203] *Forestry Tasmania v Brown* (2007) 167 FCR 34, [21].
[204] Ibid.
[205] Ibid [26].
[206] *Acts Interpretation Act 1902* (Cth) s 15AB(2)(d).

and conditions on licences for the export of wood chips'.[207] The Full Court's interpretation and application of the word 'through' and the concept of licence (a form of governmental authorisation) shine light on the legal meaning of these terms in the EPBC Act, as explained below.

6.5.16.1 'protection of the environment through [RFAs]'

The EPBC Act's description of the RFA process as involving inter alia 'protection of the environment through agreements between the Commonwealth and the relevant State …'[208] is a focus of the remainder of this chapter, specifically in the context of endangered species. The Wielangta Case demonstrates that intergovernmental agreements do not of themselves protect the environment in any real sense, particularly not the RFAs which have been criticised since their inception as more protective of industry than nature.[209]

The phrase 'protection of the environment through agreements …' (emphasis added) can be seen, according to the reasoning of the Full Federal Court in the Wielangta Case[210] (in the context of TRFA cl 68) to guarantee no substantive environmental protection beyond merely the making of agreements, however environmentally ineffective they may prove to be. As interpreted by the Full Court, the word 'through' in such a phrase makes the 'agreements' themselves the agreed form of protection, rather than imposing any environmental standard on the agreements.

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[207] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 39 (emphasis added). See also Tony Bartlett, 'Regional Forest Agreements — A Policy, Legislative and Planning Framework' (1999) 16 *Environmental and Planning Law Journal* 328, 328.
[208] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 39.
[209] Jamie B Kirkpatrick, 'Nature Conservation and the Regional Forest Agreement Process' (1998) 5(March) *Australian Journal of Environmental Management* 31; Jan McDonald, 'Regional Forest (Dis)Agreements: The RFA Process and Sustainable Forest Management' (1999) 11(2) *Bond Law Review* 295; Judith Ajani, *The Forest Wars* (Melbourne University Press, 2007).
[210] *Forestry Tasmania v Brown* (2007) 167 FCR 34.

6.5.16.2 'protection… through… conditions on licences…' and the EPBC Act's limitation of 'action'

As discussed in Chapters 2-3, prior to the passage of the EPBC Act Australian Government decisions to issue export wood chip licences attracted legal duties under three of the EPBC's predecessor statutes. Non-compliance with these duties by the Minister for Resources led various environmental NGOs (ENGOs) to successfully challenging some of the Minister's grants of export wood chip licences.[211]

However, as also explained in Chapter 3, the EPBC Act's reference to 'protection of the environment through …. conditions on licences for the export of wood chips'[212] was out-dated from the commencement of the EPBC Act as its s 524 limitation of the definition of 'action' excluded licences. Headed 'things that are not an action', s 524 excludes from being an 'action' a 'decision by a government body to grant a governmental authorisation (however described) for another person to take an action'.

Forestry Tasmania attempted to use s 524 in one of its defences to Senator Bob Brown's Wielangta Case application (examined below). Forestry Tasmania argued that its activities were not 'actions' for the purposes of s 18(3). This argument was rejected at trial and on appeal[213] (one partially redeeming feature, in a public policy sense, of the Full Court's decision).

The judgment does not, however, revive wood chip export licences as RFA wood is exempt from export control laws by RFA Act ss 6(1), (2).

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[211] *Australian Conservation Foundation Inc v Minister for Resources* (1989) 19 ALD 70; *North Coast Environment Council v Minister for Resources* (1994) 55 FCR 492; *Tasmanian Conservation Trust v Minister for Resources & Gunns Limited* (1995) 55 FCR 516; see McDonald, above n . *Regional Forest Agreements Act 2002* (Cth) ss 6(1), (2) now prevent such cases.
[212] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 39.
[213] *Forestry Tasmania v Brown (2007) 167 FCR 34*[99]-[102].

6.5.17 Costs and the Rule of Law

The fact that the Tasmanian RFA was varied by the two intervening government parties during the *Wielangta Case* to circumvent the trial judgment, while an appeal was also pursued, raises further concerns. Some of these were critically highlighted by Kirby J when, after the High Court refused Senator Brown's special leave application, Forestry Tasmania sought costs. In questioning counsel for Forestry Tasmania as to the TRFA variation when the appeal was pending in the Full Court,[214] Kirby J asked whether, 'when governments change the law, they normally preserve the position of litigation which is pending before the independent judicial branch?' [215] His Honour suggested that the court's order as to costs should take into account:

- the convention 'that those people who are in midstream in the judicial branch of government do not have their rights altered midstream by changes in the law';[216] and
- 'that it is useful to the rule of law and to peaceful government of the Commonwealth that matters like this should come to courts when after all the applicant succeeded at trial on a very lengthy trial and contested matter on the merits'.[217]

Unconvinced by Forestry Tasmania's responses, the High Court made no order as to costs. This left standing the Full Federal Court's orders that:

- Senator Brown pay Forestry Tasmania's costs of the appeal and notice of contention; and

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[214] Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008) 848-62 (Kirby J and N J O'Bryan SC).
[215] Ibid 865-7 (Kirby J).
[216] Ibid 876-8 (Kirby J).
[217] Ibid 924-7 (Kirby J).

- the parties bear their own costs of the trial proceedings.[218]

Following the taxation of costs, taxed at nearly $240,000, Forestry Tasmania's solicitors wrote to Senator Brown's solicitors advising that Forestry Tasmania's instructions were to demand payment of the sum within one month. Further, Forestry Tasmania gave notice that if the sum remained outstanding at that time then it:

1. Would execute upon the Judgment, together with interest.
2. Reserved its rights to issue Senator Brown 'relevant notices or petitions under the *Bankruptcy Act 1966*'.[219]

Senator Brown sought the opinion of the Clerk of the Senate on the consequences to him as a federal senator if Forestry Tasmania carried out its threat to proceed under the *Bankruptcy Act 1966* (Cth). The Clerk advised that the *Australian Constitution* ss 44, 45 had the effect that:

> If, as a result of the threatened action under the Bankruptcy Act, you were to become bankrupt or enter into an agreement with creditors of the kind available to debtors, you would be disqualified from further service in the Senate and your place in the Senate would become vacant.[220]

Senator Brown issued a media release, accusing Forestry Tasmania of threatening him with bankruptcy and attaching copies of the letters from its solicitors and the Clerk of the Senate. Senator Brown stated in his media release, 'I will be exploring all avenues to pay this bill on time.'[221] Three days later, Senator Brown announced

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[218] *Forestry Tasmania v Brown* (2007) 167 FCR 34 [105] where the Full Court criticised the time and expense wasted at trial due to the parties' 'improvident agreement about issues'.
[219] Letter from Mathew Wilkins, Page Seager Lawyers (Forestry Tasmania's solicitors) to Roland Browne, Browne and Fitzgerald Lawyers (Senator Bob Brown's solicitors), 29 May 2009, <http://www.on-trial.info/PDF/FT_letterJune2009.pdf> .
[220] Letter from Harry Evans, Clerk of the Senate to Senator Bob Brown, 3 June 2009, <http://www.on-trial.info/PDF/harryevansadvice_junne2009.pdf>.
[221] Senator Bob Brown, 'Forestry Tasmania Threatens Brown with Bankruptcy' (Media Release, 8 June 2009) <http://bob-brown.greensmps.org.au/content/media-release/forestry-tasmania-threatens-brown-with-bankruptcy%E2%80%AC%E2%80%AA>.

that donations from more than 1000 members of the public had poured in to help pay the costs bill. He said that the bill would be paid on time and that if greater than $240,000 was received it would be put into other campaigns for Australian forests.[222]

Notwithstanding his $240,000 legal bill, Senator Brown was fortunate that the Full Court only ordered him to pay costs of the appeal to it, leaving the parties to bear their own costs of lengthy trial. Had the Full Court or High Court applied the usual costs approach, following the event, Senator Brown would also have been ordered to pay the costs of the much longer 33-day trial. This highlights the concern that, despite some relaxation of the traditional costs rule by the High Court in *Oshlack*,[223] costs still present a procedural barrier to public interest litigation brought by individuals or civil society groups, most of whom lack capacity to draw media attention to their plight and then raise funds in the way Senator Brown managed. This costs aspect of the case adds another procedural law reform which would enhance third party enforcement under the EPBC Act.

6.6 Conclusion

This chapter explained Australia's international obligations to protect threatened species, and how these are implemented by the EPBC Act. The leading case concerning interaction of the EPBC Act and RFA Act was then examined. The resulting law, as laid down by the Full Court of the Federal Court and upheld by the High Court, leaves the EPBC Act s 38 and RFA Act s 6(4) RFA forestry exemptions trumping any protections in the EPBC Act and TRFA.

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[222] Senator Bob Brown, 'Forestry Tasmania's bill will be paid on time, says Brown' (Media Release, 11 June 2009) <http://bob-brown.greensmps.org.au/content/media-release/forestry-tasmania%E2%80%99s-bill-will-be-paid-time-says-brown>.

[223] Notwithstanding *Oshlack v Richmond River Council* (1998) 193 CLR 72; See, eg, Kellie Edwards, 'Costs and Public Interest Litigation After *Oshlack v Richmond River Council*' (1999) 21(4) *Sydney Law Review* .

6.6.1 Outcomes and Learnings from the *Wielangta Case*

The Full Court noted that EPBC Act '[s]ection 38(1) affords an escape from s 18(3) only if an RFA forestry operation is undertaken "in accordance with an RFA".'[224] However, the Court's subsequent reasoning left the words "in accordance with an RFA" requiring very little, if anything, beyond an 'RFA forestry operation'.[225] In particular, the Court held that the original TRFA cl 68 in which Tasmania 'agree[d] to protect the Priority Species …through the CAR Reserve System or by applying relevant management prescriptions' required no protection in fact.[226] Nor did cl 68

> involve an enquiry into whether CAR effectively protects the species. Rather it is the establishment and maintenance of the CAR reserves that constitute the protection.[227]

Justice Marshall warned that construing cl 68 so that neither the CAR Reserve System nor management prescriptions need deliver protection to the species 'would turn it into an empty promise'.[228] The Full Court's approach did exactly that.[229] The apparent promise in TRFA cl 68 transpired to be hollow. The Full Court's reasoning left cl 68 unenforceable and 'illusory'[230] in nature, or as Marshall J had warned, an 'empty promise'.[231]

This holds even under the Full Court's interpretation and application of the original TRFA cl 68. However, the chapter also considered implications of the variation to clause 68 of the Tasmanian RFA by then Premier Lennon and PM Howard in

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[224] *Forestry Tasmania v Brown* (2007) 167 FCR 34 [16], summarising the trial judgment.
[225] 'RFA forestry operations' are relevantly defined, by the *Regional Forest Agreements Act 2002* (Cth) s 4 as 'forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Tasmania) that are conducted in relation to land in [Tasmania – its entirety being covered by the TRFA] …' This definition is adopted by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 38(2): see above at 6.5.12.3.
[226] *Forestry Tasmania v Brown* (2007) 167 FCR 34 [59].
[227] Ibid.
[228] *Brown v Forestry Tasmania* (2006) 157 FCR 1, [241], revd (2007) 167 FCR 34.
[229] Sivayoganathan, above n 22.
[230] Ibid 42.
[231] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34 [241].

February 2007 following the *Wielangta Case* trial judgment. This changed the State's agreement 'to protect the Priority Species … through the CAR Reserve System or …' into an intergovernmental agreement that the species are protected. An apparent promise (albeit, the Full Court held, not a promise of protection) was transformed so as to deem a legal fiction of protection entirely inconsistent with the trial judgment's findings of fact and the species' endangered status at law. In so doing, both governments showed scant regard for endangered species, Australia's international obligations or the rule of law, demonstrating the mastery of politics over principle. The TRFA variation placed in peril both endangered species and the federal government's capacity to fulfil its duty to ensure compliance with Australia's international obligations. It 'leaves threatened species in a desperate predicament where biodiversity conservation conflicts with state sponsored forestry.'[232]

The Full Court's ruling also demonstrates how little is legally required of an RFA. Firstly, elements in the definition of an 'RFA'[233] prefaced by 'provide for' require mere facilitation of a framework, not delivery of outcomes in fact.

Secondly, the RFA Act, by naming four pre-existing RFAs across Australia in its definition of 'RFA forestry operation' and treating them as RFAs, conclusively renders them as such for the purposes of:

- the RFA Act; and hence
- the EPBC Act by virtue of its s 38(2).[234]

The Full Court applied this reasoning in dismissing the suggestion that the replacement of the promissory original cl 68 to the non-promissory substituted cl 68 'may deprive the TRFA of the quality of an "agreement" required by the definition

[232] Sivayoganathan, above n 145, 42.
[233] *Regional Forest Agreements Act 2002* (Cth) s 4.
[234] *Forestry Tasmania v Brown* (2007) 167 FCR 34 [78]-[79].

of [RFA].'[235] The Court noted the presence in the TRFA of several non-promissory clauses with the same structure as the new cl 68,[236] and that '[In the RFA Act], the legislature has treated the [T]RFA as a regional forest agreement as defined'.[237] The Court therefore held:

> It is accordingly inappropriate in a largely unenforceable agreement to treat the word "agreement" as importing a requirement that its provisions must be promissory in the sense used in contract cases such as *Lowe v Lombank Ltd* [1960] 1 WLR 196 at 204.[238]

The TRFA variation during the *Wielangta Case* thus graphically demonstrated how easily and radically an RFA can be amended by executive governments yet legally remain an RFA. The RFA Act will continue to describe and treat the four RFAs it names as such, irrespective of any further variations to them. It therefore follows from the Full Court's reasoning that the four named RFA will legally retain their RFA status, however amended – there seems virtually no limit to the extent to which governments can water down their apparently protective provisions. Indeed, substituted TRFA cl 68, beyond watering down the original clause, erected an affirmative legal fiction whereby 'The parties agree that [various measures] protect rare and threatened fauna and flora species and Forest Communities.'

6.6.2 Undermines *Threatened Species Protection Act 1995* (Tas)

The above bulwark for forestry operations prevents not only application of the EPBC Act to protect threatened fauna and flora forest species, but potentially also rules out use of the *Threatened Species Protection Act 1995* (Tas). As Chapter 4, by the latter Act s 51(3), 'A person acting in accordance with a certified forest practices plan' may already 'take, without a permit, a specimen of a listed taxon of flora or fauna, unless the Secretary, by notice in writing, requires the person to obtain a permit.' In

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[235] Ibid [95].
[236] Ibid [95]-[96].
[237] Ibid [97].
[238] Ibid [97].

the wake of substituted cl 68, it would be a brave Secretary of the Tasmanian Department of the Environment who attempted to regulate a forestry operation 'taking' any listed 'fauna' or 'flora' which the Tasmanian and Australian Governments have now agreed in TRFA cl 68 are protected.[239]

6.6.3 Rejection of H1 and H2 for Threatened Species

The TRFA variation in deeming endangered species to be protected, not only circumvented the *Wielangta Case* trial judgment, but set back the cause of threatened species to a less-protected legal position than implicit in the Tasmanian RFA before the case was brought. The Tasmanian RFA variation combined with EPBC Act s 38 produces an exceptionally wide exemption. The variation represents the Australian Government abandoning species impacted by Tasmanian forestry operations. As explained at 6.5.15, this unduly undermines the Australian Government's capacity to meet its international obligations to threatened species under the *Apia Convention* and *CBD*, as set out at 6.2.1 and 6.2.2, respectively.

The *Wielangta Case* therefore provides strong evidence for the rejection of H1 and H2, at least in the context of threatened species. Moreover, the reasoning inherent in the Full Court's judgment suggests RFAs are susceptible of variation in other respects, beyond threatened species, without losing their RFA status. This has broader implications as to the fluid nature of RFA's and so supports a wider rejection of H1 and H2 in the context of other MNES such as World Heritage.

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[239] *Threatened Species Protection Act 1995* (Tas) s 3(1) relevantly includes the following definitions:

> "certified forest practices plan" means a certified forest practices plan within the meaning of the *Forest Practices Act 1985* [Tas];
> …
> "fauna" includes any taxon of fauna, whether vertebrate or invertebrate, in any stage of biological development and includes eggs and any part of any such taxon;
> "flora" includes any taxon of plant, whether vascular or non-vascular, in any stage of biological development and any part of any such taxon;
> …
> "take" includes kill, injure, catch, damage, destroy and collect.

6.6.4 Disrespect for the Rule of Law and Environmental Law

In addition to the substantive content of the TRFA variation, the timing by which it was executed by the Governments following the trial judgment, but before the *Wielangta Case* appeal, raises procedural questions going to the rule of law and the separation of powers. The variation quite rightly affronted Kirby J's strong sense of justice, as indicated by His Honour's critical questions to counsel for Forestry Tasmania regarding the rule of law. The trial judgment could have been overcome, as it turned out, through the Full Court appeal alone. Or had Brown succeeded there or in the High Court, then it was open to Parliament to amend the EPBC Act and/or RFA Act. However, the use of executive power to defeat a legal (and political) opponent midstream litigation (which both Governments had successfully joined) at the very least undermined the traditional convention that Government ought conduct itself as a 'model litigant'. That PM Howard, Premier Lennon and their legal advisers were willing to vary the TRFA so bluntly to short-suit their legal and political opponent, Senator Brown, and thereby defeat such a high profile trial judgment, raises legal concerns rightly highlighted by Kirby J. It also illustrates the 'no holds barred' approach to Australian, and particularly Tasmanian, forestry politics.

The *Wielangta Case* thus epitomises how environmental law, when applied to matters of ongoing political dispute such as forestry, is invariably intertwined with political considerations. Where the law is used to challenge vested interests, such as Tasmania's State-owned forestry corporation, they may lobby to have troublesome laws changed. The *Wielangta Case* is by no means the only Australian example of Governments over-riding the courts, but they normally involve Parliament through legislation.[240] However, the TRFA variation was a brazen move, in particular substituting TRFA cl 68 so as to deem threatened species protected, thereby depriving Senator Brown of the basis for his win at trial and appeal prospects.

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[240] See, eg, Tim Bonyhady and Andrew Macintosh (eds), *Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects* (Federation Press, 2010) 16.

The fact both Governments were willing to go to such lengths (to rewrite the rules of the game, moving goalposts so as to protect industry over iconic species) in such a high profile case over the hotly contested subject of Tasmanian forestry demonstrates the challenges inherent for third parties in enforcing environmental law.

The ease of this administrative adjustment by executive governments during the *Wielangta Case* demonstrates an inherent weakness in the RFA regime, a fatal flaw rendering it unsuitable as a reliable mechanism of environmental enforcement. This shows the need for stronger, better entrenched legal mechanisms for environmental protection, which will require statutory amendments. Some such statutory suggestions arising from the *Wielangta Case* are made below.

6.7 Law Reform Recommendations from this Chapter

6.7.1 Provisions Using the Phrase 'provide for'

RFA Act s 4 defines an 'RFA' as an agreement in force between the Commonwealth and a State in respect of a region or regions, satisfying certain conditions, relevantly:

> (b) the agreement provides for a comprehensive, adequate and representative reserve system; and
>
> (c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions ...

As explained above at 6.5.6, the judgments of Marshall J and the Full Court make clear that the words 'provide for' are much weaker than 'provide' alone, and thereby undermine the RFA Act s 4 definition of 'RFA'. At a minimum, the word 'for' should be deleted from par (b) and par (c) above.

The words 'provide for' also preface the fundamental objects of the EPBC Act ss 3(1)(a) and 3(1)(a) (ca), as set out in Chapter 2. Consequently, they also undermine these object clauses, and thereby, potentially, the protective purposes of the EPBC Act. The ramifications of this were taken up by this author in a submission to a

Senate Committee Inquiry into the EPBC Act. The Committee accepted the author's submission on this issue,[241] then recommended as its first recommendation that the words 'to provide for' be deleted from EPBC Act s 3(1)(a) and (ca).[242] This, and RFA-specific aspects of the Inquiry's recommendations, are discussed in Chapter 8.

A further weakness in the RFA Act s 4 definition of an 'RFA' is apparent from the Full Court's finding that the TRFA satisfied this definition, even after the TRFA was varied so as to ensure the emasculation of cl 68. The definition should also be strengthened to make these requirements mandatory such that an RFA which does not provide them is not an 'RFA' such as to provide EPBC Act exemption.

6.7.2 Third Party Enforcement of the EBPCA Generally

As explained at 6.5.2 above, Senator Brown gained standing under the EPBC Act's wide, though not fully open, standing provisions for public interest litigants seeking an injunction. These provisions greatly relax the test for *locus standii*, which has traditionally been one procedural obstacle for Australian public interest litigants, sometimes denying them entry beyond 'a foot in the door' of the Federal Court, leaving them unable to have the merits of their case considered. The EPBC Act standing tests extend those of its predecessor environmental statutes,[243] as noted at 6.5.2, to a new 'high water mark' in Australian national environmental statutes (though some States, such as NSW, have gone further).[244] This author supports such open standing, believing that other procedural barriers, such as rules for security for costs, costs orders and vexatious litigants, provide a more appropriate, in principle, and more than adequate, in practice, deterrent to guard against the traditional concern

[241] Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, 'The Operation of the *Environment Protection and Biodiversity Conservation Act 1999*, First Report' (March 2009) 9-11.
[242] Ibid 11.
[243] See, eg, Bates, above n 36, Ch 15.
[244] Ibid.

that 'busybodies' will open the 'floodgates' and clog the courts.[245] These obstacles and risks, much more so than standing, now provide the check on those contemplating bringing public interest litigation under the Act, as noted below.

Senator Brown was not required to give an undertaking as to damages. These add substantially to the cost burden of seeking injunctions. Undertakings for interim injunctions were precluded in the original EPBC Act, but this traditional hurdle was resurrected when the Act's protection from undertakings was removed by amendments passed in 2006, shortly before the trial judgment was handed down. Hence, procedural reforms (particularly regarding undertakings as to damages, security for costs, and other cost rules) and enabling merits appeals (not merely the current judicial review), could further empower EPBC Act public interest litigation. This would enable third parties to better realise their potential to become effective surrogates for government regulation of industry,[246] as argued for in Chapter 4.

This in turn could help ensure Australia's treaty obligations are met in areas such as forestry where State governments are major industry players and successive federal Governments have also been reluctant to intervene. This seems all the more important for environmental conventions which lack direct rights of third party enforcement as contained, eg, in the Optional Protocol to the International Covenant on Civil and Political Rights.[247] That said, despite remaining procedural obstacles, the EPBC Act at least provides mechanisms for third party enforcement, a far cry from the RFA Act, in which third party enforcement provisions are entirely absent.

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[245] See, eg, Elizabeth Fisher and Jeremy Kirk, 'Still Standing: an Argument for Open Standing in Australia and England' (1997) 71 *Australian Law Journal* .

[246] Neil Gunningham, Martin Phillipson and Peter Grabosky, 'Harnessing Third Parties as Surrogate Regulators: Achieving Environmental Outcomes by Alternative Means' (1999) 8 *Business Strategy and the Environment* 211, extending the case for third party surrogate regulation from Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998).

[247] The Optional Protocol to ICCPR was successfully used by gay activist Nick Toonen against anti-sodomy sections of the *Criminal Code Act 1924* (Tas), prompting federal sexual privacy legislation to over-ride the discriminatory provisions of the Criminal Code.

6.7.3 Commonwealth Enforcement of RFAs

While remaining barriers to third party EPBC Act enforcement could be usefully addressed as above, the RFA Act is far more deficient, It contains no equivalent mechanism for third party enforcement of RFAs. As the Full Court reasoned:

> The fact that the State's obligations under Part 2 of the [T]RFA are expressed to be unenforceable points against the view that by cl 68 the State warrants that CAR will in fact protect the species. It follows that satisfactory performance of the State's obligations can only be measured by the parties, the sanction for inadequate performance by the State (in the Commonwealth's opinion) being termination of the agreement under cl 102.[248]

The *Wielangta Case* demonstrates that relying on State and Australian Governments to measure 'satisfactory performance of the State's obligations' under an RFA is unsatisfactory. The trial judgment identified serious deficiencies by Forestry Tasmania amounting to unsatisfactory performance of the Tasmania's TRFA obligations (albeit the Full Court overturned on appeal Marshall J's interpretation, in particular, of TRFA cl 68). In the face of the trial judgment, the Governments' response was not to address the impacts of forestry on endangered species, nor did the Commonwealth threaten TRFA termination. Rather, both governments agreed to vary TRFA cl 68, before the Full Court appeal hearing, so as to deem threatened species protected. This exemplifies inadequacy of reliance on the Australian Government to exercise what the Full Court described as 'the [only] sanction for inadequate performance by the State (in the Commonwealth's opinion) being termination of the agreement under cl 102.'[249] The Commonwealth did not even threaten termination to drive State improvements. Rather, the TRFA cl 68 deeming variation leaves the clause devoid of any meaningful performance requirement.

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[248] *Forestry Tasmania v Brown* (2007) 167 FCR 34, [63].
[249] Ibid.

6.7.4 Implications for Threatened Species

As found by the trial judge in the *Wielangta Case*, adverse impacts of forestry operations in RFA regions may include significant damage to nationally-listed threatened species. Exemption of such impacts from the EPBC Act's protections has been founded upon the claim that RFAs provide equivalent protection. However, as discussed, the decision of the Full Federal Court in the *Wielangta Case* rendered any promise of species protection in TRFA cl 68 (even as it originally stood) a hollow one, or as foreshadowed by Marshall J 'an empty promise'.[250]

The TRFA variation makes the plight of endangered species even worse: they are now agreed by the parties to the TRFA to be protected. This deeming provision is a laughable legal fiction given the trial judge's findings of fact. However, legally, it extinguished Senator Brown's argument that the forestry operations in question were not in accordance with the TRFA, persuading the High Court majority that it no longer needed to decide if the Full Court was correct, as the TRFA variation left Brown with insufficient prospects of success to warrant a grant of special leave to appeal. Thus, new cl 68 no doubt achieved the result intended by its drafters. For threatened species however, it produced a result the reverse of that which it deems: now, the TRFA demonstrably does not deliver any legally enforceable protection for species from forestry operations. As a consequence, neither can the EPBC Act be relied on for this purpose, as the *Wielangta Case* dramatically demonstrates. As Sivayoganathan concluded his review of the Full Court's judgment, 'it leaves threatened species in a desperate predicament where biodiversity conservation conflicts with State sponsored forestry.'[251]

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[250] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34 [241] per Marshall J. See Sivayoganathan, above n 22.
[251] Ibid 42.

The TRFA variation in February 2007 ought be reconsidered. In particular, the amended cl 68 cannot reasonably stand in its current form, which renders laughable any claim that the TRFA protects endangered species. However, given the Full Court's interpretation of the original clause 68 (which it equated in meaning with the amended cl 68), reversion to the original clause 68 would be insufficient to protect any species outside the CAR Reserve System.

6.7.5 Repealing RFA Exceptionalism to Enable EPBC Act Enforcement (by the Commonwealth and/or Third Parties)

The TRFA variation, agreed by both governments, circumvented the trial judgment of Marshall J. It exemplifies why reliance on the Commonwealth's sole RFA enforcement measure of termination (never yet exercised and unlikely given high political costs) is so inadequate to ensure Australia's compliance with international obligations. This exemplifies the need for accessible, affordable and effective third party enforcement options. Retrofitting the RFA system to enable this would be a Herculean task, not only legally, but also politically. Applying the EPBC Act to forestry would be far preferable.

Repeal of EPBC Act ss 38-42[252] would bring RFA forestry operations inside the EPBC Act tent and render them subject to its safeguards, including third party appeal rights. This would also have left standing the trial judgment of Marshall J. Chapter 8 makes over-arching law reform recommendations to address the inadequacies demonstrated by this and other case study chapters.

[252] In association with *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 38-42, it would be necessary to also repeal the equivalent s 6(4) of the *Regional Forest Agreements Act* 2002 (Cth) and *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2B).

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Chapter 7 Environmental Impact Assessment: eg Gunns Limited's Pulp Mill

'How are the mighty fallen, and the weapons of war perished!'[1]

7.1 Introduction

This chapter examines EPBC Act s 75(2B), an additional RFA forestry exemption which extends RFA exceptionalism to any forestry-related 'downstream processing' projects (eg pulp mills). It prohibits consideration by the Minister of '*any adverse impacts of*' any EPBC Act-exempt RFA forestry operations during environmental impact assessment (EIA) under the EPBC Act. This Chapter argues that RFA exceptionalism should not infect EPBC Act EIA, where a project's 'impacts' should be determined by the Act's definition of that term, not special clauses inserted for the benefit of a single industry sector.

It is argued that EPBC Act s 75(2B) and a systemic weighting flaw in the s 136(1) decision-making process for project approvals currently mitigate against integrated assessment (one of the Act's principles of ecologically sustainable development (ESD)).[2] Hence, these two provisions also undermine Australia's international EIA commitments, such as the CBD article 14(b) requirement that each Contracting Party '*… ensure that the environmental consequences …are duly taken into account.*'. They ought, therefore, be repealed and reformed respectively.

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[1] *The Bible* (King James Version, 1611), 1:27: see <http://www.phrases.org.uk/meanings/188450.html> 'How are the mighty fallen' was also used to commence ABC Radio, *Where to from here for Forestry in Tasmania?, PM* (25 September) <http://www.abc.net.au/pm/content/2012/s3597673.htm> (Mark Colvin). As this chapter explains, Gunns Limited fell from Goliath to liquidation as its proposed pulp mill project perished.

[2] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A.

Moreover, subsection 75(2B) was added to the Act at a critical time in assessment of Gunns Limited's proposed Tamar Valley pulp mill project, taking effect on 19 February 2007. A month later, Gunns withdrew its project from the Commonwealth accredited, integrated assessment underway by Tasmania's planning commission, which had been asking difficult questions of the company, including as to wood supply for the mill. Gunns then resubmitted the same project to the Commonwealth, receiving a much less rigorous form of EIA. The timing is such that 75(2B) appears to have been inserted mainly to facilitate a smoother assessment of this proposal).

The focus of this chapter is on forestry's exclusion from EPBC Act EIA. Consequently, its case study (the assessment of Gunns' pulp mill proposal) is considered predominantly through the lens of EPBC Act s 75(2B) and the subsequent litigation which turned on it, with reference to other aspects of the pulp mill imbroglio to the extent relevant. The chapter will describe some key aspects of the pulp mill EIA following the insertion of s 75(2B) and explain how it impacted on one of Australia's most controversial impact assessment processes. Gunns' proposal was controversial from the outset due to the scale and location of the proposal, but even more as the assessment process became characterised by a lack of good governance culminating in passage of the project-specific *Pulp Mill Assessment Act 2007* (Tas).

Section 7.3 outlines key provisions of the EPBC Act relevant to object (b) regarding the promotion of ecologically sustainable development. The Act's ss 38-40 exemptions for 'coupe-by-coupe' RFA forestry operations were explained in Chapter 3. Section 7.4 explains the insertion of a further exemption, s 75(2B), at the end of 2006 (commencing 19 February 2007), 'clarifying' that the RFA exemption extended to all aspects of project assessment.

The chapter then considers, in Section 7.5, aspects of the Gunns Limited's pulp mill assessment saga, commencing with the Commonwealth-accredited integrated

assessment by an independent, quasi-judicial statutory body, the Resource Planning and Development Commission (RPDC)[3] . This trusted integrated assessment process was abandoned at the proponent's behest[4] and replaced with far narrower, dichotomised State[5] and Commonwealth[6] processes. Both the replacement assessments left out vital impacts,[7] exacerbated in the mill's 50-year EPBC Act approval by a weighting flaw in s 136(1)[8]. As such, the sum of the two dichotomised 'disintegrated' assessments was inferior to the holistic integrated assessment being undertaken by the RPDC prior to Gunns' withdrawal. It is argued[9] that EPBC Act s 75(2B) and the weighting flaw in s 136(1) currently militates against integrated assessment (one of the Act's principles of ecologically sustainable development (ESD))[10] and so ought be repealed and reformed respectively.

7.2 Convention on Biological Diversity Obligations re EIA

The CBD article 14(a)-(b) states, inter alia:

> Each Contracting Party, as far as possible and as appropriate, shall … Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have *significant adverse effects on biological diversity* with a view to *avoiding or minimizing* such effects and, where appropriate, allow for public participation in such procedures … *ensure that the environmental consequences …are duly taken into account.*[11]

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[3] Section 7.5.3. Now renamed the Tasmanian Planning Commission.
[4] Section 7.5.4.
[5] Section 7.5.5.
[6] Section 7.5.11.
[7] Section 7.5.12.
[8] Section 7.5.13.
[9] Section 7.6.
[10] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3A.
[11] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) article 14(a)-(b) (emphasis added).

This chapter will argue that Australia's EIA regime need to better fulfil this requirement – particularly insofar as EIA of forestry-related projects are concerned, so as to '*ensure that the environmental consequences …are duly taken into account*.'

7.3 EPBC Act Implementation of CBD re EIA

7.3.1 EPBC Act Reliance on EIA to achieve the Act's Objects

The EPBC Act s 3(1) objects, include, most relevantly to EIA, inter alia:

> (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
>
> (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and ...
>
> (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and …[12]

The EPBC Act s 3(2) asserts that, in order to achieve its objects, the Act:

> (a) recognises an appropriate role for the Commonwealth in relation to the environment by focusing Commonwealth involvement on matters of national environmental significance and on Commonwealth actions and Commonwealth areas; and
>
> (b) strengthens intergovernmental co-operation, and minimises duplication, through bilateral agreements; and
>
> (c) provides for the intergovernmental accreditation of environmental assessment and approval processes; and
>
> (d) adopts an efficient and timely Commonwealth environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed; and …[13]

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[12] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(1). See Chapter 2.
[13] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2).

Paragraph 3(2)(d) claims that the Act's Commonwealth environmental assessment and approval process (explained in Chapter 2) 'will ensure activities that are likely to have significant impacts on the environment are properly assessed'. Note the similarity in wording to the end of the CBD article 14(b) requirement quoted above at 7.2 that each Contracting Party '… *ensure that the environmental consequences …are duly taken into account*.' However, this chapter will argue that, the machinery of the EPBC Act does not meet this claim in s 3(2)(d), at least in respect of forestry activities (see previous chapters) and downstream processing activities likely to intensify forestry and its impacts on the environment. The fundamental reason for this failure is the Act's express exemptions for RFA forestry operations from the Act's environmental protection and assessment schemes. Before turning to that, it is timely to briefly remark on the Act's provision for bilateral agreements, to which s 3(2)(b) expressly, and s 3(2)(c) impliedly refer.

7.3.2 Bilateral Agreements

As flagged in EPBC Act s 3(2)(b) and (c), bilateral assessment agreements are now in place between the Australian Government and most States, through which the Australian Government accredits certain State EIA processes, and thereafter may rely upon them in EPBC project assessment.

Further to the EPBC Act s 3(2)(b) and (c) set out above, the Act states that '[i]n order to achieve its objects, the Act' … '[s 3(2)(g)(i)] promotes a partnership approach to environmental protection and biodiversity conservation' including through 'bilateral agreements with States and Territories'.[14]

The Act's machinery enables the Australian Government to make such bilateral agreements through which it can accredit State or Territory environmental

[14] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3(2)(g)(i).

assessment and approval processes. This process, might be hoped to harmonise State environmental processes upwards and towards greater uniformity. Certainly, the RPDC's integrated assessment was superior to either its State or federal replacement. To the extent that co-operative federalism can encourage different tiers of government to work together across jurisdictions towards the common goal of ecologically sustainable development, it seems a generally desirable approach to environmental governance. However, the Australian Government's increasing reliance on bilateral agreements and push towards approval bilaterals risks becoming an excessive and undue devolution of federal power to State governments. Some States lack sufficient environmental credentials to be trusted with environmental assessment and approval power in respect of matters of national environmental significance, as history and the Pulp Mill saga show.

7.4 RFA Forestry Exempt from EPBC Act EIA: s 75(2B)

Chapter 3 explained how both RFA forestry operations undertaken in accordance with an RFA[15] and forestry operations in an RFA region where there is no RFA in force[16] are exempted from the EPBC Act's Part 3 protections. They are also, since February 2007, expressly excluded from the Act's EIA scheme by s 75(2B). This subsection ensures that EPBC Act EIA of a proposed factory which will use RFA wood cannot consider any adverse impacts of forestry operations which will be required to supply that wood.

Section 75 is a fundamental provision of the EPBC Act's EIA regime. In December 2006, the Australian Parliament passed substantial amendments[17] to the EPBC Act.

[15] *Environment Protection and Biodiversity Conservation Act 1999* (Cth)s 38.
[16] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 40.
[17] *Environment and Heritage Legislation Amendment Act 2006* (Cth).

These included, inter alia, the insertion of a new s 75(2B).[18] Section 75 now relevantly reads, in part (*emphasis added* in new s 75(2B)):

> 75 Does the proposed action need approval?
>
> *Is the action a controlled action?*
>
> (1) The Minister must decide:
>
> (a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and
>
> (b) which provisions of Part 3 (if any) are controlling provisions for the action.
>
> Note: The Minister may revoke a decision made under subsection (1) about an action and substitute a new decision. See section 78.
>
> ….
>
> *Considerations in decision*
>
> (1) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:
>
> (a) the Minister must consider all adverse impacts (if any) the action:
>
> (i) has or will have; or
>
> (ii) is likely to have;
>
> on the matter protected by each provision of Part 3; and
>
> (b) must not consider any beneficial impacts the action:
>
> (i) has or will have; or
>
> (ii) is likely to have;
>
> on the matter protected by each provision of Part 3.
>
> Note: *Impact* is defined in section 527E.
>
> ….
>
> (2B) Without otherwise limiting any adverse impacts that the Minister must consider under paragraph (2)(a), *the Minister must not consider any adverse impacts of*:
>
> (a) *any RFA forestry operation* to which, under Division 4 of Part 4, Part 3 does not apply; or
>
> (b) *any forestry operations in an RFA region* that may, under Division 4 of Part 4, be undertaken without approval under Part 9.

The Ministerial decisions which s 75(1) requires:

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[18] Subsection 75(2B) commenced on 19 February 2007: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Note 1.

- firstly, 'screen' whether an action (eg a development proposal) requires approval under the Act; (s 75(1)(a)) and

- if so, 'scope' the parameters of EPBC Act EIA by determining which matter(s) of NES the action is to be assessed against (s 75(1)(b)).

In making these decisions, the Minister must consider all adverse impacts (if any)[19] (and ignore any beneficial impacts)[20] of the action on matters of NES. However, the new s 75(2B) prohibits the Minister, in making the fundamental s 75 screening and scoping decisions, from considering: any adverse impacts of any:

- 'RFA forestry operation' undertaken in accordance with an RFA (given EPBC Act s 38); or

- 'forestry operation' in an RFA region (given EPBC Act s 40).

The amending Act's Explanatory Memorandum spelled out the intent of new s 75(2B) as follows:

> New subsection 75(2B) is to clarify that in making a controlled action decision, in relation to proposed developments, such as, a factory which will use timber from [an] RFA region, the Minister must not consider any adverse impacts of any RFA forestry operation (as defined in section 38) or a forestry operation in an RFA region (as defined in section 40). Sections 38 and 40 of the Act *exempt RFA forestry operations* and *forestry operations in RFA regions from the need for approval under the Act*. If these sections do not apply because of section 42 then new section 75(2A) [sic] inserted by this item also does not apply.[21]

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[19] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2)(a).
[20] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2)(b).
[21] *Environment and Heritage Legislation Amendment Act 2006* (Cth), Explanatory Memorandum, 30, [82] (*emphasis added*).

Subsection 75(2B) commenced (along with other amendments passed in December 2006) on 19 February 2007. Only one month later, Gunns Limited withdrew its controversial proposal to construct pulp mill in Tasmania's Tamar Valley from the integrated assessment which the Commonwealth had previously accredited under the EPBC Act. Gunns then resubmitted the same proposal to then Minister Turnbull. Shortly thereafter, the Minister determined the project should now be assessed under the EPBC Act's 'preliminary documentation' method, relying on s 75(2B) to exclude from the assessment's scope of forestry operations needed to supply the mill.

7.5 Case Study: Gunns Limited's Tamar Valley Pulp Mill

Gunns Limited proposed (and at the time of writing still proposes) to construct and operate a bleached Kraft pulp mill at Bell Bay in Tasmania's Tamar Valley, north of Launceston. The proposal would currently be the world's fourth largest such mill.

7.5.1 Purpose of Case Study

The purpose of the following case study is to illustrating some of the problems inherent in s 75(2B), some other provisions of the EPBC Act, and the wider themes of this thesis. For example, paralleling the amendment of TRFA cl 68 (which was to follow later in 2007), it seems likely that the Gunns' pulp mill proposal, and earlier legal efforts to have impacts of its wood supply subject to environmental assessment, were major drivers in the Government's drafting of new s 75(2B). Thus, for 'factory' in the Explanatory Memorandum's explanation of new s 75(2B), set out above, one might read 'pulp mill'. The effect of s 75(2B), however, extends also to other timber-fed 'downstream processing' projects.

7.5.2 Significance of Case Study

The pulp mill is worthy of examination beyond is value in explaining the purpose and practical application of EPBC Act s 75(2B) The pulp mill saga has already been the subject of much controversy and criticism, as arguably the dominant single issue

in Tasmanian political debate since, Gunns' withdrawal from the integrated assessment. Debate has raged over the proposed project and, in particular for present purposes, the processes ultimately used to assess it. Aspects of the Tasmanian process have also been challenged, unsuccessfully, in the Supreme Court of Tasmania[22] and on the floor of state Parliament.[23]

7.5.3 Integrated Assessment of Gunns' Pulp Mill by the RPDC

On 22 November 2004, then Tasmanian Premier Paul Lennon declared Gunns' pulp mill proposal a 'project of State significance' under s 18(2) of the *State Policies and Projects Act 1993* (Tas) and referred it to Tasmania's Resource Planning and Development Commission (RPDC).[24]

The RPDC is established by the *Resource Planning and Development Commission Act 1997* (Tas). It is an 'independent statutory body that is responsible, under the State Policies and Projects Act 1993, for carrying out integrated assessments of projects of State significance.'[25] The RPDC is a quasi-judicial body in the sense that its statute provides for it to conduct hearings, affording procedural fairness to *all* parties, in order to make legally binding determinations (appealable on questions of law to the Supreme Court of Tasmania).[26]

Once the Minister declares a proposal to be a 'project of State significance', the RPDC is invested with jurisdiction to assess the project against relevant guidelines. This integrated assessment process involves examination of all environmental, social,

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[22] *Landon-Lane v Minister for Economic Development and Tourism* (2009) 170 LGERA 124.
[23] The Tasmanian Greens have introduced unsuccessful bills seeking repeal of the *Pulp Mill Assessment Act 2007* (Tas).
[24] *State Policies and Projects (Project of State Significance) Order 2004* (Tas).
[25] Resource Planning and Development Commission, *About the Gunns Pulp Mill Project* <http://www.rpdc.tas.gov.au/poss/pulp> accessed previously but now removed from the public record.
[26] See *Transcript of RPDC Directions Hearing* <http://www.rpdc.tas.gov.au/__data/assets/pdf_file/0007/75499/FEB22PUB_Version_2.pdf> 8.

community and economic impacts of a proposal.[27] The breadth of the assessment, which overrides other state laws, saves the proponent from having to make multiple applications to multiple authorities for permits, licences and other approvals.

A bilateral assessment agreement between Tasmania and the Commonwealth accredited the RPDC's integrated assessment process for the purposes of the EPBC Act.[28] Accordingly, on 23 March 2005, the Federal Environment Minister decided that this integrated assessment was also the appropriate method to assess Gunns' pulp mill for EPBC Act purposes.

The RPDC's integrated assessment includes submissions then normally public hearings[29] at which competing evidence can be presented and tested through cross-examination:

> The assessment of a project is an open and transparent process, designed to encourage public participation and input throughout the assessment. Public consultation is vital in allowing community, conservation, industry, local government and State government agencies the opportunity to contribute to the overall assessment process.[30]

The RPDC determined that both public submissions and hearings were necessary for the pulp mill assessment.[31]

In August 2005 Gunns withdrew its first referral from the Commonwealth and referred an altered proposal, now specifying the company's sole preferred location

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[27] Ibid 10. See also Resource Planning and Development Commission, *General Information on the Integrated Assessment Process* <http://www.rpdc.tas.gov.au/poss/generalinfo> accessed previously but no longer at this URL.
[28] Bilateral agreement between the Commonwealth and State of Tasmania under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), 12 December 2005.
[29] See RPDC, above n 26, 9. For example, while the RPDC is not bound by the rules of evidence, it must observe the rules of natural justice (procedural fairness): *Resource Planning and Development Commission Act 1997* (Tas) now renamed the *Tasmanian Planning Commission Act 1997* (Tas).
[30] See RPDC, above n 26, 10.
[31] See <http://www.rpdc.tas.gov.au/poss/pulp/assessmentprocess> (accessed previously but now removed from the public record).

(Bell Bay) and excluding its previous alternative site (Hampshire in NW Tasmania). Furthermore, Gunns had originally claimed that 'Only world's best technology utilising a low impact Total Chlorine Free (TCF) mill will be looked at.'[32] However, Gunns' second referral proposed not TCF, but rather an Elemental Chlorine Free ('ECF') mill, thereby allowing use of chlorine compounds.

On 26 October 2005 the Federal Minister again decided that the second referral should be assessed by the RPDC's integrated assessment.[33]

7.5.4 Gunns Withdraws from RPDC's Integrated Assessment

The RPDC process continued, but with disquiet - due largely to perceived Government interference. In early January 2007, the RPDC announced in rapid succession the resignations of two of the four members of its Pulp Mill Integrated Assessment Panel. These were:

- Dr Warwick Raverty, a Panel member with specialist pulp mill scientific expertise; and
- Julian Green, chairman of the Panel, the RPDC's Executive Commissioner, and a highly respected former Secretary of Tasmania's Department of Justice.

Both resignations were related to activities of the State Government's Pulp Mill Task Force, which some perceived as giving rise to an apprehension of bias in Dr Raverty through its dealings with his employer. Green had previously asked the Premier to rein in the Task Force. The RPDC's Annual Report later quoted Green's notification to the RPDC that:

> Upon investigation of the application by the Tasmanian and Australian Greens for the disqualification of Dr Raverty, fellow

[32] See Gunns Limited, Pulp Mill Information Sheet (2004); Paul Lennon re conversion of Scandinavian mills from ECF to TCF: Judy Tierney, *Pulp Mill Proposal* (14 November) Stateline Tasmania, ABCTV <http://www.abc.net.au/stateline/tas/content/2003/s989531.htm>.
[33] See <http://www.rpdc.tas.gov.au/poss/pulp/assessmentprocess> (accessed previously but now removed from the public record).

> panel member, it has been discovered that activities of the Pulp Mill Task Force from as far back as February 2005 have given rise to circumstances which no longer make it possible for me to remain as chair and panel member.[34]

The Annual Report also made clear that the RPDC "…. did not receive a consistently high level of cooperation from [Gunns]"[35] and that perceived delays in the assessment process were due to:

- vital information from Gunns containing "a number of omissions and errors";[36] and
- Gunns' failure to supply corrected information within various timelines directed by the RPDC.[37]

For example, at a Directions Hearing on 22 February 2007, the new chair of the RPDC Pulp Mill Integrated Assessment Panel, former Supreme Court judge Christopher Wright QC, declared that responsibility for delays in providing material to the RPDC rested with Gunns. He set out a time line detailing remaining steps to complete the assessment process by the end of 2007, saying in relation to a December 2005 indication that the RPDC process may be concluded by 28 May 2007:

> However, it has become quite apparent that due to accumulated delays, all or most of which appear to have resulted from Gunns failure or inability to comply with their own prognostications or the panel's requirements, that time line can no longer apply. This was obvious well before the October directions hearing last year and I think should come as no surprise to interested parties, least of all the proponent.[38]

Wright subsequently directed the RPDC's Acting Executive Commissioner, Simon Cooper, to write to Gunns telling the company it was critically non-compliant with certain RPDC requirements. The letter was drafted but delayed due to intervention by

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[34] RPDC, above n 26, 12.
[35] Ibid 9.
[36] Ibid 11.
[37] Ibid 11-3.
[38] above n 3 quoted in RPDC, above n 26, 13.

then Secretary of the Department of Premier and Cabinet, Linda Hornsey.[39] Before it was sent, Gunns abandoned the RPDC integrated assessment process.

On 14 March 2007, Gunns announced in a statement to the Australian Stock Exchange and media release that it was withdrawing from the RPDC integrated assessment process and 'had referred the project to the State Government'.[40] This later phrase is curious as there was no State Government process to refer the project to, Gunns having deserted the extant (and only) process. As the RPDC's Annual Report later noted:

> Of course whether an integrated assessment of a project of State significance proceeds, and upon what terms, is a matter for Parliament and not for a proponent.[41]

Gunns claimed as justification for abandoning the RPDC – previously endorsed by it (and both major political parties at the 2006 State election) – that the process was taking too long. Suddenly, time was of the essence. Gunns' CEO, John Gay, claimed that delays were costing the company $1M a day and the company required the project to be assessed within what it described as a 'commercial timeframe'. However, given that the RPDC had made clear that Gunns was responsible for the delays and Gunns had not countered this criticism, the real reason for abandonment of the RPDC is open to speculation. It may be that Gunns saw as becoming increasingly remote:

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[39] Ms Hornsey later 'advised' Attorney-General Steve Kons to shred his signed Cabinet recommendation that Cooper was the successful applicant for appointment as a permanent magistrate in Hobart. Kons did so, later denying in Parliament the document's existence, or that he shredded it (then resigning after the document was tabled, reconstituted from a shredding bag). A subsequent Legislative Council inquiry found credible evidence that Hornsey 'intervened with a judicial appointment process on the basis of irrelevant considerations, including the very real possibility of personal payback.' It appears from Cooper's evidence that Hornsey's motivation was his work with the RPDC, specifically the draft letter to Gunns advising the company's critical non-compliance. Cooper had subsequently released the letter in response to an FOI request to the RPDC. Hornsey, on behalf of DPAC (notwithstanding her prior involvement) had refused to release the letter under FOI. See further: Tom Baxter and Roland Browne, 'Probity Issues Connected with the Tasmanian Pulp Mill' (Paper presented at the Australian Public Sector Anti-Corruption Conference, Brisbane, 28-30 July 2009) <http://www.apsac.com.au/2011conference/2009/2009papers.html> 16; and Legislative Council Select Committee on Public Sector Executive Appointments, 'Interim Report' (Parliament of Tasmania, 2009) <http://www.parliament.tas.gov.au/ctee/Council/psea.htm>143-4.

[40] Gunns Limited, Media Release, 14 March 2007.

[41] RPDC, above n 26, 9.

(a) its chances of a favourable recommendation from the RPDC process; and/or

(b) approval by the new Federal Government likely to be elected at the Federal election due late 2007.

7.5.5 *Pulp Mill Assessment Act 2007* (Tas) [PMA Act]: Enactment

The day after Gunns' public announcement of its withdrawal from the RPDC, 15 March 2007, Premier Lennon made a Ministerial Statement to the Lower House of the Tasmanian Parliament. He brazenly announced the creation of a new and separate approvals process for the pulp mill, with legislation to be introduced into parliament the following week. Apparently, in the space of about 24 hours, the government had decided to legislate an assessment and approval process solely for Gunns' pulp mill.[42] On 17 April 2007 the *Pulp Mill Assessment Act 2007* (Tas) ('*PMA Act*') passed the Parliament and on 30 April 2007 received Royal Assent.

7.5.6 PMA Act Scheme

The PMA Act abandoned the partly-completed integrated assessment by the RPDC.[43] Instead, the Act provided for the Minister 'to appoint a consultant to undertake an assessment of the project … against the [Act's] guidelines.'[44] 'After undertaking an assessment of the project under [s 4(1)], the consultant [was] to report to the Minister, based on the assessment, that' the project should, or should not proceed.[45] If the consultant recommended approval, then the Minister was to prepare a draft permit for

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[42] Mr Lennon has since maintained, including on two occasions before an Upper House Select Committee, that he had no advance knowledge of Gunns' intention to withdraw from the RPDC process on 14 March 2007. However, the Parliamentary Committee heard evidence from at least two key witnesses inconsistent with this account: Legislative Council Select Committee on Public Sector Executive Appointments, above n 32, <http://www.parliament.tas.gov.au> 64-70.

[43] By revoking *State Policies and Projects (Project of State Significance) Order 2004* (Tas): see *Pulp Mill Assessment Act 2007* (Tas) s 13 and RPDC, above n 26, 9, 13.

[44] *Pulp Mill Assessment Act 2007* (Tas) s 4(1).

[45] *Pulp Mill Assessment Act 2007* (Tas) s 4(3).

consideration and approval by the parliament.[46] Once both Houses endorsed the permit, the project was deemed to be approved, notwithstanding any other Tasmanian law.[47]

7.5.7 Inadequacy of PMA Act 'Guidelines'

The PMA Act defined the 'project' extremely widely.[48] By contrast, the Act's 'guidelines' were very narrow, much narrower than those the RPDC had been using prior to Gunns' withdrawal. The PMA Act's 'guidelines' were not the RPDC's 'Final Scope Guidelines for the Integrated Impact Statement (IIS): Proposed bleached kraft pulp mill in Northern Tasmania by Gunns Limited', December 2005.[49] Instead, the Act defined 'guidelines' as the 'Recommended Environmental Emission Limit Guidelines for any new Bleached Eucalypt Kraft Pulp Mill in Tasmania', August 2004.[50] These latter PMA Act guidelines, self-described as 'non-statutory',[51] were inherently far narrower in scope, being largely restricted to emission limits (only one aspect of the mill's environmental impact). The Act's guidelines were also less site-specific than, and had been superseded by, the RPDC's later work.

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[46] *Pulp Mill Assessment Act 2007* (Tas).
[47] *Pulp Mill Assessment Act 2007* (Tas) s 8.
[48] "project" is defined in s 3(1) as meaning:
"the project declared by the Administrator to be a project of State significance on 22 November 2004 in Statutory Rules 2004, No. 111, being the proposal by Gunns Limited (ACN 009 478 148), as amended, for the development and operation of a bleached kraft pulp mill in northern Tasmania including any use or development which is necessary or convenient for the implementation of the project, including but not limited to the development and operation of any facility or infrastructure for –
(a) the supply or distribution of energy to or from the mill; and
(b) the collection, treatment or supply of water; and
(c) the treatment, disposal or storage of waste or effluent; and
(d) access to or from the mill; and
(e) transport to or from the mill; and
(f) the storage of pulp at, or transport of pulp from, a sea port in the northern region or the north-western region; and
(g) the production of materials for use in association with the operation of the mill".
[49] See <http://www.rpdc.tas.gov.au/poss/pulp/publications>.
[50] *Pulp Mill Assessment Act 2007* (Tas) s 3(1) and Schedule 1.
[51] See the *Pulp Mill Assessment Act 2007* (Tas) Schedule 1 "guidelines", Preamble, p vii.

7.5.7.1 PMA Act's Narrow 'Guidelines' for Wood Supply

The PMA Act guidelines contained one paragraph headed 'Implications of various feedstocks', noting '… some differences in the specific chemical composition between BEK effluents and effluents produced from other feedstocks' and, *inter alia*:

> There guidelines focus on emission limits and it will be up to any new pulp mill proponent to evaluate the capability of a potential mill to meet those limits..[52]

By contrast, the 'Final Scope Guidelines for the Integrated Impact Statement (IIS): Proposed bleached kraft pulp mill in Northern Tasmania by Gunns Limited', December 2005 had specified 14 separate types of detailed information regarding the mill's pulpwood supply – hardwood and softwood – that should be included in the IIS project description.[53] Wood supply had been one of the concerns (along with the mill's water requirements and the Tamar Valley's air pollution problems) publicly raised by Dr Raverty following his resignation from the RPDC.[54]

Thus, the PMA Act, *inter alia*:

- ended the integrated assessment;[55]
- replaced the RPDC,[56] an independent, quasi-judicial statutory body, with a consultant to be appointed by the Premier;[57] and
- grossly mismatched its vastly defined 'project[58] with an assessment against narrow, generic, outdated emission 'guidelines.[59]

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[52] See the *Pulp Mill Assessment Act 2007* (Tas) Schedule 1 "guidelines", p 25, [B.13].
[53] See <http://www.rpdc.tas.gov.au/__data/assets/pdf_file/0020/66305/Final_IIS_guidelines2.pdf> at pp 10-12. The RPDC website has been taken down since it became the Tasmanian Planning Commission, and most detailed information regarding the RPDC's pulp miull assessment has been removed. So rpdc.tas.gov.au links are no longer operational, nor is much of the information they previously linked to now online. Nevertheless, some of the original links are kept here as records of where I originally accessed the information.
[54] Simon Bevilacqua, 'Raverty threatens protest', *The Mercury* 11 February 2007.
[55] By revoking *State Policies and Projects (Project of State Significance) Order 2004* (Tas): see *Pulp Mill Assessment Act 2007* (Tas) s 13 and RPDC, above n 26, 9, 13.
[56] *Pulp Mill Assessment Act 2007* (Tas) s 12.
[57] *Pulp Mill Assessment Act 2007* (Tas) s 4(1).

7.5.8 Removal of Rights of Appeal, Review etc: PMA Act s 11

7.5.8.1 The Privative Clause Generally

The Pulp Mill Permit was approved by both Houses of Parliament in August 2007. In terms of public participation, the PMA Act removed all public hearings which the RPDC had determined essential,[60] and by s 11 precluded all appeal and review rights:

> **11. Limitation of rights of appeal**
>
> (1) Subject to subsection (3) and notwithstanding the provisions of any other Act –
>
> (a) a person is not entitled to appeal to a body or other person, court or tribunal; or
>
> (b) no order or review may be made under the *Judicial Review Act 2000*; or
>
> (c) no declaratory judgment may be given; or
>
> (d) no other action or proceeding may be brought –
>
> in respect of any action, decision, process, matter or thing arising out of or relating to any assessment or approval of the project under this Act.
>
> (2) For the purposes of subsection (1), "any action, decision, process, matter or thing arising out of or relating to any assessment or approval of the project under this Act" includes any action, decision, process, matter or thing arising out of or relating to a condition of the Pulp Mill Permit requiring that the person proposing the project apply for such other permits, licences or other approvals as may be necessary for the project.
>
> (3) Subsection (1) does not apply to any action, decision, process, matter or thing which has involved or has been affected by criminal conduct.
>
> (4) No review under subsection (3) operates to delay the issue of the Pulp Mill Permit or any action authorised by that permit.

Privative clauses are not unknown, but s 11(4) prevents even review for criminal conduct from delaying issue of the Pulp Mill Permit or any action authorised by it. The

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[58] *Pulp Mill Assessment Act 2007* (Tas) s 3(1).
[59] *Pulp Mill Assessment Act 2007* (Tas) s 3(1) and Schedule 1.
[60] See Christopher Wright QC, transcript of RPDC Hearing February 2007; Simon Cooper, Evidence to Legislative Council Select Committee on Public Sector Executive Appointments, above n 39.

Bill, and s 11 in particular, were strongly criticised before the Bill was passed[61] and remain a source of much consternation in Tasmania.[62]

7.5.8.2 Right to Reasons Removed by s 11: Supreme Court

In July 2009, the Supreme Court of Tasmania held that s 11(1)(b) precluded affected land owners from obtaining any orders under the *Judicial Review Act 2000* (Tas), including a statement of reasons for the conditions imposed on the Pulp Mill Permit.[63]

7.5.9 Validity of Pulp Mill Permit Questioned

In May 2009, University of Tasmania constitutional and planning law expert Michael Stokes (a supervisor of this thesis) published a detailed legal opinion arguing, that the Pulp Mill Permit was invalid due to the consultant failing to assess the mill against all the guidelines, thereby breaching s 4 of the PMA Act.[64] He also argued that this breach was potentially open to challenge, since it was probable that PMA Act s 11 did not prevent review for jurisdictional error.[65] Stokes told *The Australian* that, as the Permit was in part issued under the *Land Use Planning and Approvals Act 1993* (Tas), it might expire two years after its issue by Parliament unless the mill was

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[61] See eg Michael Stokes and Tom Baxter, 'Comments on Pulp Mill Assessment Bill 2007', *Tasmanian Times* (online), 26 March 2007 <http://tasmaniantimes.com/index.php?/weblog/article/comments-on-pulp-mill-assessment-bill-2007/>a copy of which was provided to all Legislative Councillors at a briefing by the authors; Philippa Duncan, 'Mill Bill Under Fire', *The Mercury* (Hobart), 27 March 2007, 3.

[62] See eg Tom Baxter, 'A Tale of Two Municipalities – What About the Rest?' 7 February 2008, *Tasmanian Times* <http://tasmaniantimes.com/index.php?/article/pulp-polls-a-tale-of-two-municipalities-what-about-the-rest/> and numerous other articles and reports at <http://tasmaniantimes.com> and elsewhere in Tasmanian media.

[63] *Landon-Lane v Minister for Economic Development and Tourism and Premier of Tasmania* [2009] TASSC 50 (Unreported, Evans J, 17 July 2009). See eg ABC Hobart, *Pulp mill legal bid unsuccessful* <http://www.abconline.net.au/news/stories/2009/07/17/2629335.htm?site=hobart>.

[64] Michael Stokes, 'Validity of the Pulp Mill Permit', *Tasmanian Times* (online), 2009 <http://tasmaniantimes.com/index.php?/article/validity-of-the-pulp-mill-permit/>. Michael Stokes is a co-supervisor of this thesis.

[65] Ibid 11.

substantially commenced by late August 2009.[66] A Gunns spokesman dismissed Stokes' analysis as "ridiculous" and insisted the company was confident in the legality of the state approval and permit. However, he would not make any comment as to whether this view was based on a contrary legal opinion.[67] At that time, there was no substantive work on site. In early August 2009, Gunns' new CEO told the media that company was 'doing early preparation work' on site, though it did not yet have a joint venture partner nor financial close.[68]

7.5.10 *Pulp Mill Assessment Amendment (Clarification) Act 2009* (Tas)

At the end of the 2009 Parliamentary sitting year, the Government introduced the Pulp Mill Assessment Amendment (Clarification) Bill 2009 (Tas). The Bill inserted into the PMA Act new ss 8(4)-(6). These subsections provide that:

- The Pulp Mill Permit[69] (and permits which the PMA Act deems issued under the *Land Use Planning and Approvals Act 1993* (Tas) or the *Water Management Act* 1999 (Tas))[70] lapse if the project is not substantially commenced within four years of the Pulp Mill Permit coming into force.
- A permit that is taken, in accordance with the PMA Act s 8(1)(c), to be issued under the *Land Use Planning and Approvals Act 1993* (Tas) or the *Water Management Act 1999* (Tas) and would have lapsed before the Clarification Act commenced, is taken to have not so lapsed.[71]

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[66] Matthew Denholm, 'Gunns' approval for mill 'invalid'', *The Australian* 11 May 2009 <http://www.theaustralian.com.au/news/gunns-approval-for-mill-invalid/story-e6frg6n6-1225710737759>.
[67] Ibid.
[68] Nick Clark, 'Gunns Begins Mill Site Work', *The Mercury* (online), 4 August 2009 <http://www.themercury.com.au/article/2009/08/04/88695_tasmania-news.html>.
[69] PMA Act s 8(4).
[70] PMA Act s 8(5).
[71] PMA Act s 8(6).

The Wilderness Society released aerial photos taken on 23 October 2009 'showing that vegetation has been cleared for the entire footprint of the pulp mill'.[72] The Society described this as 'potentially in breach of permit conditions', noting, 'The permit expired after two years in August 2009 and has not yet been renewed or extended.'[73] The Society also claimed 'substantial anecdotal evidence from Tamar Valley residents that clearing activity has been occurring [sic] during September and October …. on the pulp mill site following the expiry of the permit' and that, 'The Government must uphold the law and investigate this potential breach.'[74] Instead however, after the Government guillotined debate in the Lower House, the Clarification Bill passed the Upper House,[75] becoming Act No. 65 of 2009.

Figure 7.1 – John 'Polly' Farmer, *The Mercury*, 5 November 2009[76]

[72] Paul Oosting, 'Government must investigate potential illegal vegetation clearance at pulp mill site', *The Wilderness Society* (Media Release, 9 November 2009)<http://tasmaniantimes.com/index.php?/pr-article/government-must-investigate-potential-illegal-vegetation-clearance-at-pulp->.
[73] Ibid.
[74] Ibid.
[75] ABC News, *Green Light for Pulp Mill Permit* <http://www.abc.net.au/news/stories/2009/11/12/2741123.htm?site=news>.
[76] John 'Polly' Farmer, Editorial Cartoon, *The Mercury* (online), November 5, 2009 <http://www.themercury.com.au>.

The next, 2011, deadline for substantial commencement passed with minimal further works on the proposed pulp mill site as Gunns Limited was placed in receivership and then in liquidation. That process, inter alia, set aside a legal challenge by the Tasmanian Conservation Trust alleging that the Pulp Mill Permit had lapsed for lack of substantial commencement. Gunns Limited receivers, KordaMentha, say they are seeking a buyer for Gunns' assets, including the Pulp Mill Permit.

7.5.11 Effect of EPBC Act s 75(2B) in Pulp Mill Assessment

With the abandonment by Gunns and the Tasmanian Parliament of the RPDC process, which had been assessing the project under the EPBC Act as well as State legislation, Gunns now had no assessment process in place to secure approval under the EPBC Act. So, on 28 March 2007 Gunns withdrew its second EPBC referral then on 2 April 2007 resubmitted another (third) referral of its pulp mill proposal.

On 2 May 2007, the Hon. Malcolm Turnbull, (then) Minister for the Environment and Water Resources (the Minister), made two critical assessment decisions under the EPBC Act. First, assessing Gunns' pulp mill as a controlled action, he determined that the project be assessed only by 'preliminary documentation', excluding public hearings. Second, he allowed 20 days for public comment on the proposal. It must be acknowledged that the range of issues to be assessed under the EPBC Act, ie matters of NES, were narrower than the RPDC process, which also had to look at non-NES (State) issues. However, given that public involvement in the decision-making process had been stripped back from a right to participate and cross-examine witnesses in RPDC public hearings – which would have occurred over some months – to no involvement in the consultant's desktop analysis under the *Pulp Mill Assessment Act 2007* (Tas), the role of the national assessment had now become critical.

The Minister's above two decisions were assisted by the fact that he avoided wood supply issues; his subsequent statement of reasons for the decisions stating:

> … as required by subsection 75(2B) of the EPBC Act, I did not consider any adverse impacts of forestry operations before 2017 for the supply of wood chips to the proposed mill.[77]

Neither did the Minister examine such arrangements after the 2017 expiry of the Tasmanian RFA, describing these as uncertain and essentially speculative.

On 17 May 2007 The Wilderness Society instituted an application seeking judicial review of relevant decisions by the Minister. On 9 August 2007 this application was dismissed by Marshall J.[78]

The Full Court of the Federal Court (Branson, Tamberlin and Finn JJ) heard the Society's appeal from 17-19 October 2007. On 22 November the Full Court, by majority (Tamberlin J dissenting), dismissed the appeal.[79]

Following is an extract from the Full Court's summary of its reasons for judgment.

> … The decisions [challenged] concerned the selection of the process by which the proposal by Gunns Limited to construct and operate a pulp mill at Bell Bay in northern Tasmania was assessed under the EPBC Act, the time provided for public comment as part of that process and the identification of the matters of national environmental significance to be considered in the course of that process.
>
> The Full Court, in a majority decision, has dismissed the appeal from the judgment given by the primary judge.
>
> All members of the Full Court rejected the following submissions of the Wilderness Society:

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[77] *The Wilderness Society Inc v Minister for the Environment and Water Resources* (2007) 96 ALD 655; affd (2007) 166 FCR 154 [97].
[78] Ibid. This trial judgment of Marshall J sets out various aspects of the pulp mill decision-making process, most beyond the scope of this paper.
[79] *The Wilderness Society Inc v Minister for the Environment and Water Resources* (2007) 166 FCR 154.

(1) that the referral by Gunns Limited to the Minister of its proposal to construct and operate a pulp mill at Bell Bay was invalid because Gunns Limited had withdrawn an earlier referral relating to the same proposed action;

(2) that the Minister denied the Wilderness Society procedural fairness in respect of his final approval decision by setting a period for public comment on the pulp mill proposal that was too short; and

(3) that in setting a period of 20 days for public comments on the pulp mill proposal the Minister acted for an improper purpose, namely to accommodate a time frame that suited the commercial interests of Gunns Limited.

The majority of the Court also rejected the submission of the Wilderness Society that the Minister was obliged to consider any adverse impacts on matters of national environmental significance of the forestry operations necessary to provide the wood chips to feed the pulp mill. The majority took the view that the EPBC Act discloses a clear legislative intent ordinarily to exclude forestry operations undertaken pursuant to Regional Forest Agreements (RFAs) from the assessment regime established by the EPBC Act. It noted that the *Regional Forests Agreements Act 2002* (Cth) makes provision for a separate regime built upon RFAs which are required to take into account environmental and other values of national significance in relation to forestry operations. The Tasmanian Regional Forest Agreement was signed by the Australian and Tasmanian Governments in 1997.

The dissenting judge took the view that the obligation of the Minister to consider all adverse impacts of the proposed pulp mill was not limited by the Tasmanian Regional Forest Agreement in the way the majority held. Concluding that the Minister failed to consider whether the forestry operations necessary to supply wood chips to the pulp mill were incidental to the construction and operation of the mill, the judge held that the Minister erred by not considering the adverse effects which those forestry operations would have on matters of national environmental significance, as required by s 75(2)(a) of the EPBC Act. The judge accepted the submission of The Wilderness Society that the Minister had not properly understood or complied with his obligations, and that his decisions are therefore invalid.

At the time of the judgment the subject of this appeal the Minister had not given approval for the construction and operation of the pulp mill. The legality of that decision was

> therefore not directly challenged on this appeal. However, had the Full Court upheld the challenges made by the Wilderness Society to the Minister's decisions, it would have found that the assessment process required by the EPBC Act was not conducted as required by law.
>
> It is necessary to stress that the Federal Court has no jurisdiction to consider the merit or wisdom of any decision of the Minister. The sole concern of the Federal Court in this matter, both before the primary judge and on appeal, was the legality of the decisions made by the Minister that were the subject of the proceeding before the primary judge.[80]

Thus, the Full Court upheld the legality of the assessment process and its exclusion of adverse impacts of 'upstream' forestry operations to supply the mill's wood. In the course of his dissenting judgment (which turned on the interpretation of EPBC Act s 42(c)), Tamberlin J stated that

> The interpretation of "incidental to" favoured by the majority in this case could produce the odd result whereby fortuitous or subordinate logging on a relatively small scale, such as a one-off activity to clear part of a forest to make space for the construction of a road or school or playing field, would be covered by s 42(c) as incidental, yet other essential forestry operations on a very large scale and having much greater adverse impacts over several decades in relation to many millions of tonnes of harvested timber would be regarded as not incidental. In my view, this anomalous consequence points strongly against the interpretation favoured by the majority.[81]

Justice Tamberlin also noted that his interpretation of the relevant provisions and conclusion were supported by the purposes:

1. 'to which s 42 is directed';[82] and
2. 'for which the Act was created.'[83]

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[80] Ibid.
[81] Ibid [113].
[82] Ibid [114].
[83] Ibid [118].

The later purpose was evident from the Act's title, from its objects as expressed in s 3, and from the Explanatory Memorandum to the *Environmental Protection and Biodiversity Conservation Bill 1998* (Cth).[84]

Justice Tamberlin's points are well made. However, the Wilderness Society did not seek special leave to appeal to the High Court, citing cost concerns.[85] This was unfortunate, since the High Court may have been more receptive to an application for special leave in this case (given the dissenting judgment of Tamberlin J) than in the *Wielangta Case*[86] examined in Chapter 6. The *Wielangta Case* saw a unanimous Full Court of the Federal Court overturn the trial judge. By contrast, the pulp mill assessment case saw a majority Full Court concur with the same trial judge, Marshall J. Furthermore, the High Court's rejection of special leave in the *Wielangta Case*[87] turned largely on the TRFA cl 68 as amended during the litigation. Both cases proved very expensive for the applicants. The Wilderness Society citing costs concerns as its basis for not seeking special leave interests in such an important case highlights the gravity of costs risks for third parties. If their potential as surrogate environmental regulators is to be fully realised, then risks from adverse costs orders in public interests litigation need to be ameliorated. Given the facts of the case (summarised in the trial judgment),[88] its outcome also raises various other concerns as to the operation of EPBC Act, most beyond the scope of this chapter.[89]

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[84] Ibid.
[85] The Full Federal Court determined costs in *The Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources* [2008] FCAFC 19 (Branson, Tamberlin and Finn JJ, 4 March 2008).
[86] *Forestry Tasmania v Brown* (2007) 167 FCR 34.
[87] Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008).
[88] *The Wilderness Society Inc v Minister for the Environment and Water Resources* (2007) 96 ALD 655; affd (2007) 166 FCR 154.
[89] For example, other concerns warranting further consideration include:

- the exclusion of public hearings from both the PMA Act and Turnbull's *Environment Protection and Biodiversity Conservation Act 1999* (Cth) assessment on preliminary documentation (especially given the importance the RPDC attached to public hearings);

7.5.12 Sustainability of Wood Supply Not Assessed

The Court's application of s 75(2B) upheld the Minister's refusal (in the face of many public submissions seeking the contrary) to consider any adverse wood supply impacts of any RFA forestry operations. Such impacts include, firstly, quantitative sustainability issues, eg 'Can Tasmania's forests produce enough wood to supply a world-scale pulp mill for the next few decades?'[90] A well-respected professional forest scientist with 35 years' experience considered this issue (in the context of the abandonment of the RPDC's integrated assessment, which would have considered wood supply). Having examined three key documents that had been produced pursuant to the RPDC's pulp mill assessment process (before it was abandoned), and drawing upon his 'own knowledge of the productivity of eucalypt plantations in Tasmania and their current capacity to supply pulpwood',[91] Dr Beadle concluded:

> projected wood supplies may not meet the requirements of the mill over its lifetime, and that supplying large amounts of wood to a pulp mill neglects existing and new opportunities to add greater value to wood.[92]
>
> ….
>
> I can only conclude that omitting independent scrutiny of the wood supply from the ongoing assessment of the proposal was a flawed decision. …[93]

- the ability of the proponent to withdraw one EPBC referral then submit another (its third) referral of the same proposed action, thereby obtaining a significantly less rigorous assessment method than the RPDC integrated assessment previously determined appropriate; and
- the decision that interested parties (eg the Wilderness Society) were owed no duty of procedural fairness by the Minister (especially in comparison to the RPDC's statutory duty to provide procedural fairness to all parties to its hearings: see above n 29).

[90] Chris Beadle, 'Tasmania's Pulp Mill: The Forgotten Issue is Wood Supply' (2007) 28(9) *Australasian Science* 32, 32-3.
[91] Ibid 32.
[92] Ibid 32.
[93] Ibid 33.

Dr Beadle noted that 'Kraft pulp mills, once operational, require wood on a continuous basis.'[94] This highlights a second concerning implication of the s 75(2B) prohibition on EIA of wood supply. The prohibition applies even if the proposed 'downstream processing' proposal (eg pulp mill) will necessitate new, expanded or intensified forestry operations upstream which will adversely impact matters of NES – any such adverse impacts are precluded from EPBC Act EIA by s 75(2B). Consider this in the context of Gunns' pulp mill, which has been backed to the hilt by both Labor and conservative parties (the two dominant parties in Australia) at both the state and federal levels, throughout the state and federal assessment processes.[95] If and when the mill has been built and is operating, it will be politically untenable for either major party governing in Tasmania to allow the mill to run out of wood supply during its operational lifetime. To do so would jeopardise, inter alia, the jobs of the nearly 300 workers expected to be employed directly in the mill. It will therefore be incumbent on a government of either party to ensure the mill has sufficient wood supply to operate.

Gunns originally promised (eg in its referrals under the EPBC Act) that the mill would be supplied from RFA forestry operations in Tasmania. The PMA Act and EPBC Act assessments were undertaken and the mill approved in 2007 on that basis. Assessment of forestry impacts were excluded from the Minister's EIA and subsequent approval decision whereby he granted Gunns Limited a 50-year approval to construct *and* operate the pulp mill and associated infrastructure.[96]

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[94] Ibid 32.

[95] While one Labor MP abstained when the Pulp Mill Assessment Bill 2007 (Tas) passed the Lower House, she lost her seat at the March 2010 election (not necessarily for that reason). In May 2011, the Tasmanian Greens leader (by then a Cabinet Minister in a Labor-Green coalition government) moved a bill to repeal the *Pulp Mill Assessment Act 2007* (Tas). The Bill was voted down by all Lower House members of the Labor and Liberal parties.

[96] Minister's Approval, EPBC 2007/3385, 4 October 2007 <http://www.environment.gov.au/epbc/notices/assessments/2007/3385/decision.html>. The approval, effective until 31 December 2057, contained Conditions 14 and 15 to mitigate impacts on eagles from mill construction, but not from upstream forestry. The Minister's approval was appealed,

In his statement of reasons for approval of Gunns' proposal, Minister Turnbull acknowledged that the proponent of any new operation to supply materials such as chemicals to mill could trigger the EPBC Act, but stated that new RFA forestry operations which might need to be undertaken to supply the mill could not.[97] This left the TRFA (and presumed future renewals of it) as the only mechanism relied upon by the Australian Government to ensure such forestry operations protect matters of NES. As the previous chapters have demonstrated, the TRFA is inadequate to ensure protection of matters of NES. Hence approving the pulp mill's construction *and* operation (thereby locking in the substantial future forestry operations needed to supply the mill), without any EPBC Act EIA of wood supply impacts on matters of NES, was imprudent, placing matters of NES at risk. Yet the insertion of s 75(2B) mandated such an outcome.

Thirdly, the case also leaves as lawful the perverse situation where the Minister considered impacts on members of threatened species unfortunate enough to inhabit the pulp mill construction site, but ignored the far greater ecological footprint of forestry operations required to supply the mill over its lifetime. Such forestry impacts affect nationally-listed endangered species which the Australian Government has international legal obligations to protect, eg the endemic Wedge-tailed Eagle – Tasmanian (*Aquila audax fleayi)* – total population estimated at less than 1,000 birds, consisting of an estimated 95 successful breeding pairs.[98]

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unsuccessfully, by Lawyers for Forests Inc, on non-forestry grounds: *Lawyers for Forests Inc. v Minister for the Environment Heritage and the Arts* [2009] FCAFC 114 (3 September 2009).

[97] Malcolm Turnbull, Minister for the Environment and Water Resources, Statement of Reasons for Decision to Approve the Proposed Action by Gunns Limited to Construct and Operate a Pulp Mill at Bell Bay, Tasmania and Associated Infrastructure (EPBC 2007/3385), 1 November 2007, [71]-[73] enclosed under cover of Letter from Vicki Middleton, Assistant Secretary, Referrals Section, Approvals and Wildlife Division, Department of the Environment and Water Resources, Australian Government to Tom Baxter, 2 November 2007.

[98] Department of the Environment and Water Resources Australian Government, 'Recommendation Report Prepared for EPBC Project 2007/3385' (2007) <http://www.environment.gov.au/epbc/notices/assessments/2007/3385/pubs/recommendation-report.pdf>.

Further consideration of EPBC Act approval decisions is largely beyond the scope of this thesis, except insofar as concerns s 136(1), discussed below.

7.5.13 Flaw in the EPBC Act Approval Process: s 136

Another problem for integrated assessment and ESD lies in the EPBC Act's final project approval provisions, specifically s 136(1)(a). Subsection 136(1) sets out matters which the Minister must consider in the approval decision:

> **136 General considerations**
>
> *Mandatory considerations*
>
> (1) In deciding whether or not to approve the taking of an action, and what conditions to attach to an approval, the Minister must consider the following, so far as they are not inconsistent with any other requirement of this Subdivision:
>
> (a) matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action;
> (b) economic and social matters.

Environmental costs / impacts on only the limited 'matter protected' by controlling matter(s) of NES provisions (under s 136(1)(a)) are thus liable to be weighed against perceived benefits of all '(b) economic and social matters' (unfettered compared to s 136(1)(a)) in approval decision.

The Interim Report of the current Independent Review of the EPBC Act persuasively identified a key problem regarding s 136.[99] On the face of s 136(1)(a), there seems a real risk that it could be interpreted as 'blinkering' the Minister by limiting him/her to matters relevant to the controlling NES provisions, thereby preventing the Minister from considering any:

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[99] Australian Government, Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, Interim Report (2009) <http://www.environment.gov.au/epbc/review/publications/pubs/02-objectives.pdf> (following oral submissions by this author and others).

- non-controlling NES impacts or costs (there may be some, not considered 'significant' impacts); or
- non-NES environmental impacts or costs (eg significant impacts or costs on non-NES aspects of the environment).

The risk is that the MNES limitation in s 136(1)(a) is liable to unduly restrict holistic Commonwealth environmental assessment and approval considerations,[100] thereby undervaluing total (NES + non-NES) environmental impacts/costs.

The approval problem is that, in marked contrast to s 136(1)(a), s 136(1)(b) simply requires the Minister to consider 'economic and social matters'.[101] Thus s/he is likely to consider the sum total of all economic benefits of a proposal, and not restrict these to economic benefits of 'national significance' as occurs under s 136(1)(a).

This produces a systemic underweighting of environmental impacts relative to social and economic matters in s 136 approval decisions. This in turn could unduly weight s 136 approval decisions in favour of approval, or prevent the Minister imposing environmental conditions suitably adapted for the needs of the whole environment.

One might hope that State assessment processes would assess all non-NES environmental impacts. But even if this occurred, the State will not assess impacts on the whole environment (eg it can leave NES impacts to the Commonwealth). The State will compare non-NES environmental costs with the proposal's total economic benefits. So State approval is also likely to be granted, again weighing a limited basket of environmental costs against the proposal's total economic benefits.

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[100] Especially given that s 136(5) expressly prohibits the Minister from considering any matters beyond the relevant considerations contained in Division 1 of Part 9 of the Act.

[101] Note that in considering all the s 136(1) matters, s 136(2) requires that the Minister must take into account various factors, including the principles of ESD: s 136(2)(a), etc. Sections 137-140A contain some further environmental protections. However, while these extra provisions are very important, they do not overcome the imbalance between environmental and economic and social matters inherent in s 136(1).

An unedifying example of this problem with perverse outcomes occurred in the assessments of Gunns' Tamar Valley pulp mill proposal after Gunns withdrew from the RPDC's Commonwealth-accredited integrated assessment which had been examining all environmental impacts, both non-NES and NES. Neither of the subsequent State nor Commonwealth separate assessments considered all environmental impacts, yet doubtless the approvals granted by both tiers of government were each based on assessments of total economic benefits, largely dependent on data provided or commissioned by the project proponent.[102]

Figure 7.2 at the end of this chapter illustrates (with artistic licence) how Minister Turnbull's EIA was confined mainly to impacts of pulp mill effluent in the Commonwealth marine area, commencing 3 nautical miles out from the more ecologically sensitive Tasmanian coastline. This represents only a small subset of the project's net environmental impacts, so its intensive scrutiny by the Commonwealth missed the bigger picture. It also perversely reduced net environmental outcomes, eg:

> The Department [was] advised that *moving the outfall further offshore will increase the diffusion/dispersal of pollutants and reduce the chances of them being driven ashore*. However, the Department is of the view that moving the outfall further offshore would proportionately *increase the likelihood of effects* in the *Commonwealth* marine area.[103]

Impacts on nationally endangered species were considered by the Commonwealth, but not where most substantial: from forestry operations to supply the mill – any impacts of those forestry operations being excluded by s 75(2B).

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[102] The veracity of pulp mill economic assessments and their use has been persuasively critiqued by eg Associate Professor Graeme Wells in various pieces beyond the scope of this paper. See eg Graeme Wells, 'Da Vinci, Picasso and Minister Tony Burke', *Tasmanian Times* 20 July 2009 <http://tasmaniantimes.com/index.php?/article/da-vinci-picasso-and-minister-tony-burke/>. See also Tom Baxter, 'Mill Subsidies: Just the Tip of the Iceberg', *Tasmanian Times* 27 November 2007 <http://tasmaniantimes.com/index.php?/article/mill-subsidies-just-the-tip-of-the-iceberg/>.

[103] Department of the Environment and Water Resources, Australian Government, above n 98, 16 [46] (emphasis added).

Such systematic flaws limit EPBC Act EIA which misses the bigger picture, militating against balanced cost benefit analysis, the best interests of the overall environment, and achievement of the Act's objects, including ESD.

It has, of course, been axiomatic to the Act that it restricts Commonwealth consideration of environmental matters to matters of NES.[104] However, this is one limitation now worthy of reconsideration, at the very least in this s 136 context. Given that the Commonwealth's extensive Constitutional power is now so apparent, particularly regarding corporations,[105] it is less a question of what the Commonwealth can regulate than what it should. Section 136 is an area which should be reformed.

A better and more holistic approach would be if, once Commonwealth involvement is triggered by any matter of NES, then all environmental impacts (of NES and non-NES) are considered by the Commonwealth in:

- the EPBC assessment (possibly with some reliance on State processes if these provide adequate assessments of non-NES matter); and
- certainly, in the s 136 approval decision.

This would move EPBC Act approvals, and hence assessment, towards a more integrated approach.

To balance consideration of environmental matters with the 'economic and social matters' in s 136(1)(b),the current s 136(1)(a) should be replaced with a provision to the following effect:

> '(a) matters relevant to any matter protected by a provision of Part 3 and any other aspect of the environment;'.

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[104] Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (2009), Interim Report at [2.135]-[2.136].
[105] Ibid [2.19].

7.6 Conclusion: Due Process Pulped

This chapter examined EPBC Act s 75(2B) and how it impacted the assessment of Gunns' Tamar Valley pulp mill proposal. It explained how, the month after s 75(2B) commenced in February 2007, Gunns withdrew, in March 2007, from an EPBCA-accredited, integrated assessment of the project by Tasmania's planning commission, which would have considered, *inter alia*, impacts of wood supply to the mill.

The next day, Premier Lennon announced his intention to legislate a fast-track assessment to expedite the project's approval. The guillotining of debate on the *Pulp Mill Assessment Act 2007* (Tas), then the Tasmanian Parliament's approval of the pulp mill project within six months, highlight its willingness to trample over independent planning processes, local communities and their civil rights at the behest of one big business and its corporate forestry interests. That Gunns, the Premier and the majority of the State Parliament were willing to go to such lengths for such a controversial project underlies the political power of the Tasmanian forestry industry.

In May 2007, s 75(2B) facilitated exclusion of forestry impacts from the federal EIA of Gunns' pulp mill. The Full Federal Court later upheld, by a 2-1 majority, the lawfulness of the Minister's decision, s 75(2B) being instrumental to the Minister's defence. Its insertion in the EPBCA, presumably for precisely that purpose and part way through the proposal's assessment, is symptomatic of the poor governance associated with the project. Thus, the independent RPDC's Commonwealth-accredited integrated assessment of the pulp mill project was abandoned (at Gunns' behest), then replaced by separate State and Commonwealth assessments. The sum of these two 'disintegrated' assessment paths was inferior to the holistic integrated assessment being undertaken by the RPDC prior to Gunns' withdrawal.

The EPBC Act's objects purport, *inter alia*, to promote ESD principles, including integrated assessment. However, the Act's RFA forestry exemptions militate against this and the Act's environmental protection and biodiversity conservation goals. As

earlier chapters have shown, EPBC Act ss 38-40 RFA forestry exemptions are highly problematic. Adverse impacts of forestry operations in RFA regions may significantly damage matters of NES, eg nationally-listed threatened species such as the Tasmanian Wedge-tailed Eagle. Hence, such adverse impacts ought not be exempt from EPBC Act protections.

The s 75(2B) wholesale exemption from EIA of RFA forestry operations goes even further and is 'a bridge too far'. Assessment of a development such as construction and operation of Gunns' pulp mill ought (eco)logically include its impacts in:

- entrenching or furthering 'upstream' forestry operations to supply the mill; or
- otherwise affecting the intensity, locations, scale, timing, etc of forestry operations during the mill's lifetime.

These are 'impacts' of such a project, even as that term is narrowly defined in the EPBC Act s 527E. Yet, s 75(2B) prohibits the Minister from considering such adverse impacts, thereby (as held by the Full Court majority) preventing inclusion of their damaging effects on MNES in EPBC Act assessment. This prohibition illogically fetters Ministerial discretion adversely environmentally and, as Tamberlin J noted, inconsistently with the Act's title, purpose and Explanatory Memorandum.

Replacement of the RPDC's integrated assessment with the far narrower *Pulp Mill Assessment Act 2007* (Tas) and EPBC assessment on 'preliminary documentation', limited EIA to a narrower range of issues than the RPDC's integrated assessment. By excluding *inter alia*, forestry impacts and public hearings, it split, dichotomised and truncated the assessment process. This ultimately enabled Minister Turnbull to grant a 50-year conditional approval for the pulp mill on 4 October 2007, shortly before the Federal election was called and the Howard Government entered caretaker mode. That approval decision, while beyond this chapter's scope, is subject to the s 136(1)(a) imbalance described in section 7.5.13 of the chapter.

A further problem with the ss 38-42 and 75(2B) exemptions is that they unfairly advantage forestry operations and forest-related development proposals over other

industries which must obtain EPBC approval (possibly subject to conditions) before significantly impacting matters of NES. Deletion of these sections would place forestry development proposals on a level playing field (at least in EPBC Act terms).

7.7 Law Reform Recommendations

The best way to protect matters of NES from the impacts of RFA forestry operations would be to delete the EPBC Act ss 38-42[106] and s 75(2B). The EPBC Act contains various mechanisms which the Commonwealth could then use to assess the impacts of forestry operations in a place such as Tasmania and issue approval(s) as appropriate, subject to suitable conditions, eg to protect nationally-listed species.

While EPBC Act ss 38-42 remain, then given s 75(2B) was inserted 'to clarify' the situation, it is possible that its repeal alone might not render RFA forestry operations required to supply a pulp mill to subject to EPBC Act assessment. Therefore, to avoid this risk, a stronger and preferable alternative to repeal of s 75(2B) would be to reverse its intent by amending it as follows, to delete the words struck out and inserting those in *italics*:

(2B) Without ~~otherwise~~ limiting any adverse impacts that the Minister must consider under paragraph (2)(a), the Minister must ~~not~~ consider any adverse impacts of:

> ~~(a)~~ any ~~RFA~~ forestry operation ~~to~~ which ~~the , under Division 4 of Part 4, Part 3 does not apply; or~~ *will be or is likely to be required in association with the action that is the subject of a proposal referred to the Minister.*
>
> ~~(b) *any forestry operations in an RFA region* that may, under Division 4 of Part 4, be undertaken without approval under Part 9.~~

Subsection 136(1) should also be reformed in the manner this chapter recommended.

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[106] In association with repeal of *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss 38-42, the equivalent s 6(4) of the *Regional Forest Agreements Act* 2002 (Cth) should also be repealed.

As the Federal Court pointed out in the pulp mill assessment case, it 'has no jurisdiction to consider the merit or wisdom of any decision of the Minister';[107] its sole concern being 'the legality of the decisions made by the Minister that were the subject of the proceeding before the primary judge'.[108] Such judicial review pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is far more limited than the merits appeals jurisdiction of the Commonwealth's Administrative Appeals Tribunal (AAT) and most State environment courts or tribunals which 'stand in the shoes' of the original decision-maker to hear cases *de novo.*

Merits appeals (by any person with EPBC Act standing under its test) should be available for a much wider range of EPBC Act decisions than is currently permitted, including project approval decisions. The added accountability provided by subjecting these EPBC Act decisions to a right of merits appeal, would encourage more holistic, better, environmental decision-making. The AAT is already in place, and can hear appeals against some EPBC Act decisions, so there is not good reason not to extend its remit to key decisions such EPBC Act project approvals, including the adequacy or otherwise of conditions imposed on approvals.

[107] *The Wilderness Society Inc v Minister for the Environment and Water Resources* (2007) 166 FCR 154.
[108] Ibid.

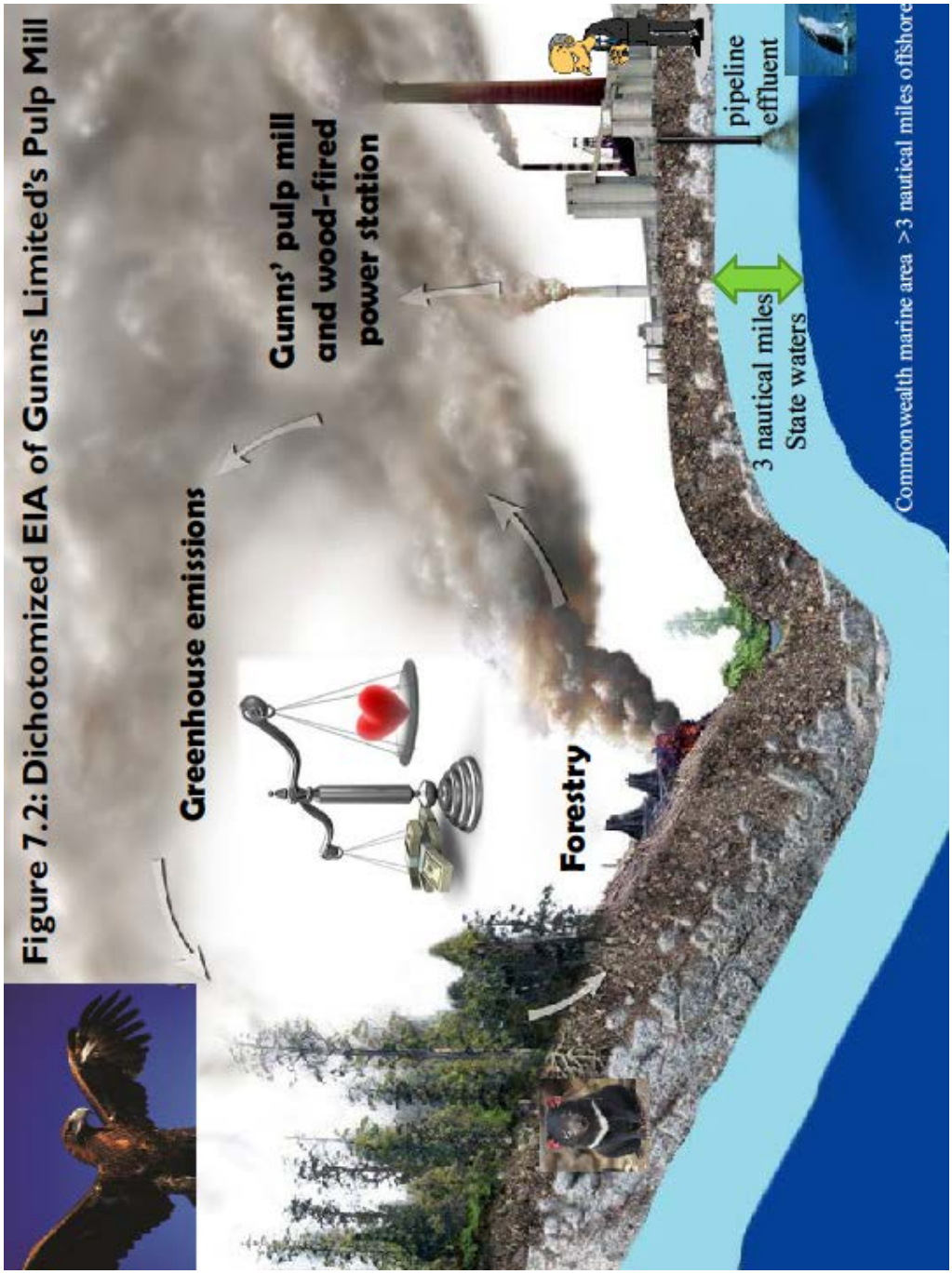

Figure 7.2 – Dichotomized EIA of Gunns Limited's Pulp Mill (p 386 refers)

Chapter 8 Conclusion: the Need for Law Reform

> … there is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things. Because the innovator has for enemies all those who have done well under the old conditions, and lukewarm defenders in those who may do well under the new. This coolness arises partly from fear of the opponents, *who have the laws on their side*, and partly from the incredulity of men, who do not readily believe in new things until they have had a long experience of them. Thus it happens that whenever those who are hostile have the opportunity to attack they do it like partisans, whilst the others defend lukewarmly…: Niccolò Machiavelli, *The Prince*[1]

8.1 Introduction

This chapter draws together the findings of the thesis and makes the case for reform of RFA exceptionalism to create a 'new order' of environmental assessment for Australian forestry. It commences by applying Machiavelli's 500 year-old warning to contemporary political and legal reform efforts. The chapter then summarises how inadequacies in the current RFA regulatory regime (and in the EPBC Act) have been acknowledged by parliamentary and statutory inquiries into the EPBC Act. However, recommendations for reform of RFA exceptionalism from both these authorities have been dismissed by successive Australian Governments. This chapter argues that the Government's position is legally untenable in light of Australia's international environmental obligations, and that it should be revisited.

8.2 Political Challenges of Law Reform

Machiavelli's insights into the perils of leading innovation which threatens vested interests apply to many contemporary environmental challenges, including the subject of this thesis. For example, it has been demonstrated that Australian forestry

[1] Niccolò Machiavelli, *The Prince* (W K Marriott trans, Constitution Society, first published 1515, 1908 ed) <http://www.constitution.org/mac/prince00.htm> Ch VI (emphasis added).

corporations 'have the laws on their side', through the federal regime of RFA exceptionalism, established through the EPBC and RFA Acts (as initially explained in Chapter 3). All the more so are the laws on the side of the forestry industry in Tasmania by virtue of exemptions for its forest practices regime from the State's Resource Management and Planning System (examined in Chapter 4).

Furthermore, to fortify RFA exceptionalism when challenged, Australian and Tasmanian Governments were willing to shift the 'goal posts' or ground rules of the regulatory playing field, eg to:

1. Seek from the World Heritage Committee delisting of TWWHA forests after their June 2013 inscription in World Heritage List (Chapter 5).

2. Vary the TRFA cl 68 to create a legal fiction that endangered species are protected by the TRFA, to overturn a trial judge's findings of fact[2] to the contrary (Chapter 6).

3. Insert EPBC Act s 75(2B) to extend RFA exceptionalism from the forests to project EIA, prohibiting the Minister from considering any adverse impacts of RFA forestry operations which a downstream wood processing project could entrench for many decades (Chapter 7).

4. Pass a project-specific statute in the *Pulp Mill Assessment Act 2007* (Tas), including its extraordinarily wide privative clause in s 11, after the proponent company unilaterally withdrew from the federally accredited EIA process with which the RPDC had found it critically non-compliant (Chapter 7).

Machiavelli's statement that beneficiaries of an old order will attack reform efforts 'like partisans' is reflected in long-standing bipartisan support by both of Australia's

[2] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34.

dominant political parties for the RFA regime. This bipartisanship also crosses State and federal divides, demonstrated, for example by the Tasmanian and Australian Governments (of opposite political persuasions, at the time) both intervening in the *Wielangta Case* to support Forestry Tasmania and then varying the TRFA so as to defeat Bob Brown's litigation (Chapter 6). Machiavelli may also be apposite in explaining how native forest hardwood loggers have for so long held sway with government over (and at the expense of) their softwood plantation counterparts, despite the compelling economic and conservation case made by Dr Ajani[3] to transition Australian forestry from the former towards the latter.

Machiavelli's quote also appears to have significant explanatory value when applied to the Australian Government's refusal to date to countenance recommendations to reform RFA exceptionalism. Perhaps, as discussed later in this Chapter, this coolness of the Australian Government's response to proposals to reform RFA exceptionalism derives from fear of opposition from the forestry industry, especially given its political power, including within the Labor Party. For example, Dr Ajani quotes PM Paul Keating's environment adviser stating that if, in 1994, the federal Resources Minister had accepted the Environment Minister's advice for a moratorium on logging 1297 coupes to be logged in 1995, 'a huge explosion' would have resulted as the pro-industry forces in the Labor Party wanted the 'green tap turned off' and they were on the ascendancy.[4] Dr Ajani then notes that:

> Since losing the 1996 federal election, Labor has avoided forest policy for fear of another explosion. Tasmanian environmentalists and Prime Minister Howard dragged them back eight years later in the 2004 election. This time Mark Latham filled the Labor leader's seat and Labor bungled forests again.[5]

[3] Judith Ajani, *The Forest Wars* (Melbourne University Press, 2007).
[4] Ibid 17 quoting her interview with Simon Balderstone.
[5] Ibid 17.

Undoubtedly, Mark Latham's experience scarred and scared the Labor Party. Subsequently federal Labor assiduously avoided the issue until the Gillard government backed reform driven from Tasmania and supported by the State's then Labor-Green government.[6] Thus, Australian forestry law reform has long been a politically charged and challenging issue. The next sections explain how recommendations for reform of RFA exceptionalism arising from a Senate inquiry and statutory review of the EPBC Act were rejected by the Rudd and Gillard governments, suggesting little appetite to reform the legal regime.

8.3 Senate Committee Inquiry Into the EPBC Act

In 2008-09, the Senate Environment, Communications and the Arts Committee undertook an inquiry examining the EPBC Act.[7] The Senate Committee produced two reports, tabled in March and April 2009: the first reported on the operation of the EPBC Act generally; and the second on interaction between the EPBC Act and the RFA Act. Key recommendations of the inquiry for this thesis are summarised below.

8.3.1 First Report Recommendation 1: Delete 'to provide for' from EPBC Act Objects

As noted earlier in Chapters 2 and 6, the words 'provide for' (upon which so much turned in the *Wielangta Case*)[8] also preface the fundamental objects of the EPBC Act ss 3(1)(a) and 3(1)(a) (ca). The ramifications of this were taken up by this author in a submission to the Senate Committee (active research relating to the *Wielangta Case*).

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[6] Former Environment Minister Tony Burke has recalled how PM Kevin Rudd told him to keep the 'lid' on forest issues. PM Julia Gillard signed the Tasmanian Forest Intergovernmental Agreement but kept a public distance from negotiations which preceded it, leaving the issue to Minister Burke.

[7] Senate Environment, Communications and the Arts Committee, Parliament of Australia, *Inquiry into the operation of the Environment Protection and Biodiversity Conservation Act 1999* (2009), Canberra. This chapter builds in part upon submissions by the author to this inquiry and Dr Hawke's subsequent independent review of the EPBC Act.

[8] *Forestry Tasmania v Brown* (2007) 167 FCR 34 (see Chapter 6).

Chapter 2 of the Committee's first report regarding 'The objects of the Act' accepted and cited inter alia my submission[9] regarding the wording of the EPBC Act objects. The Committee then adopted, as its Recommendation 1, the suggestion that the words 'to provide for' be deleted from objects ss 3(1)(a) and (ca).[10]

Certainly, the 'provide for' preface in EPBC Act object s 3(1)(a) renders it far weaker than the wording of the World Heritage Convention arts 4 and 5. These articles require Australia to 'ensure' protection, conservation, etc, not merely 'provide for' them – particularly given the weak meaning of 'provide for' under Australian law. Accordingly, for consistency with such international obligations, the objects of the Act ought not be undermined by retaining the 'provide for' qualification and the Committee's recommendation implemented.

8.3.2 DAFF's Answers to Senate Committee Inquiry

The abject inability of the Australian Government to ensure RFA forestry protects threatened species was succinctly exemplified by the Department of Agriculture, Fisheries and Forestry (DAFF) in its written answers to questions from the Senate Committee.[11] Asked direct questions, in writing, hapless DAFF bureaucrats could do little more than restate their government's (indefensible) TRFA variation.

For example, DAFF noted that the RFAs deem (through Commonwealth and State agreement) that legislation and other measures 'will *provide for* the protection of

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[9] Tom Baxter, Submission No. 65 to the Senate Standing Committee on Environment, Communications and the Arts Committee, Parlaiment of Australia, *Inquiry into the Operations of the Environment Protection and Biodiversity Conservation Act 1999*, 17 February 2009.

[10] Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, 'The Operation of the *Environment Protection and Biodiversity Conservation Act 1999*, First Report' (March 2009) [2.10].

[11] Senate Environment, Communications and the Arts Committee, Parliament of Australia, *Inquiry Into the Operation of the Environment Protection and Biodiversity Conservation Act 1999* (2009), Second Report, [1.98]-[1.100].

threatened species' (*emphasis added*).[12]

There would be *no legal consequences for species extinctions* within RFA regions, DAFF advised, provided the forestry activity 'meets all legislative and regulatory requirements, and is undertaken in accordance with an RFA'.[13] The *Wielangta Case* and the resultant 2007 TRFA variation illustrate how easily such an extinction scenario could unfold, quite legally and consistently with the TRFA.

The Full Court in the *Wielangta Case* had described the Tasmanian RFA as 'a largely unenforceable agreement'.[14] Yet subsequently, in responding to the Senate Committee, DAFF cited the Tasmanian RFA as an *exception* to the general rule that;

> there are no obligations within RFAs imposing a legally enforceable obligation upon the states to ensure the protection of species or ecological communities listed in the EPBC Act.[15]

That is, DAFF considered the TRFA *more* legally enforceable than RFAs for other RFA regions. Given the flaws in the TRFA, particularly its new cl 68, this suggests that any Wielangta-type attempt that might be made to use the EPBC Act to protect species from RFA forestry in regions other than Tasmania would fail there too.

8.3.3 Second Report Recommendation

The majority report (by mainly Labor Senators) of the Senate Committee's Second Report had one recommendation:

> The committee notes that the Minister for the Environment has formally asked the Independent Review of the EPBC Act to consider the findings and recommendations of this inquiry (see letter 13 March 2009). Accordingly the committee recommends that the Independent Review consider the findings in this report and recommend proposals for *reform that would ensure that RFAs*, in

[12] Ibid [1.99]. See earlier as to the inadequacy of 'provide for'.
[13] Ibid [1.100].
[14] *Forestry Tasmania v Brown* (2007) 167 FCR 34, [34].
[15] Senate Environment, Communications and the Arts Committee above n 11, [1.98].

> respect of matters within the scope of Part 3 of the EPBC Act, *deliver environmental protection outcomes, appeal rights, and enforcement mechanisms no weaker than if the EPBC Act directly applied.*[16]

The minority dissenting report (by Liberal and National Party Senators) opposed this recommendation, decrying it as an abandonment of bipartisan support for RFAs. A minority additional report by Greens Senator Rachel Siewert argued for the repeal of RFA exceptionalism. While the majority report of the Senate Committee's Second Report did not support calls for repeal of RFA exceptionalism, the nature of the RFA Act and RFAs themselves are not at all amenable to '*reform that would ensure that RFAs*, in respect of matters within the scope of Part 3 of the EPBC Act, *deliver environmental protection outcomes, appeal rights, and enforcement mechanisms no weaker than if the EPBC Act directly applied.*'[17] By far the simplest, most effective and elegant (in drafting terms) way to 'ensure' this outcome would be to apply the EPBC Act directly, by repeal of RFA exceptionalism.

Unfortunately, and despite the subsequent Hawke review of the EPBC Act also recommending reform of the Act's objects, when in September 2011 the Australian Government eventually tabled its response to the Senate Committee's Inquiry, the Government did 'not agree to amend the objects of the Act.'[18] The government simply stated that its 'view is that the objects of the EPBC Act are already sufficiently clear and that there is no need to change them at the present time.'[19]

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[16] The Senate Standing Committee on Environment, Communications and the Arts, *The Operation of the Environment Protection and Biodiversity Conservation Act 1999: Second Report* (2009), Recommendation 1 <http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/report/report.pdf> (emphasis added).
[17] Ibid (emphasis added).
[18] Australian Government, 'Australian Government Response to the Senate Standing Committee on Environment, Communications and the Arts Committee Report: Operations of the *Environment Protection and Biodiversity Conservation Act 1999* (First, Second and Final Reports)' (2011) <http://www.environment.gov.au/epbc/publications/epbc-operations-govt-response.html> 2.
[19] Ibid.

Similarly, it rejected reform of RFA exceptionalism, including as recommended by the below statutory review of the EPBC Act by Dr Allan Hawke.

8.4 Independent Statutory Review of the EPBC Act

The EPBC Act s 522A requires an independent review of the EPBC Act every ten years. The Minister commissioned Dr Allan Hawke, a former Secretary of the Department of Defence, and Chancellor of the Australian National University, to undertake the first review, assisted by an expert panel. As noted above, the Minister asked Dr Hawke to consider the Senate Committees' recommendation.

8.4.1 RFA Failures in terms of NAFI Submission to Hawke Review

NAFI's submission to the Independent Review of the EPBC Act was quoted extensively in Chapter 3. For example, NAFI stated:

> The RFAs are part of the continual improvement of Australia's sustainability credentials for forest management. The RFAs have *ensured* that *suitable areas have been allocated into the comprehensive, adequate and representative (CAR) reserve system, as well as determining stringent environmental controls for the remaining production forest estate.*[20]

The latter sentence's two assertions that '[t]he RFAs have ensured that suitable areas have been allocated into the … (CAR) reserve system, as well as determining stringent environmental controls for the remaining production forest estate' go to the heart of the case for RFAs. However, both claims are, it is submitted, highly questionable. Firstly, given that areas of high conservation value forest, including what are now (at the time of writing) extensions to the TWWHA inscribed on the World Heritage List, were excluded from reserves by the RFA process and, at the

[20] National Association of Forest Industries (NAFI), Submission No 133 to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999,* December 2008 (emphasis added).

time of NAFI's submission, still lay outside the reserve system, clearly the RFAs had not, as claimed above, 'ensured that suitable areas have been allocated into the comprehensive, adequate and representative (CAR) reserve system.'

On the contrary, the reserve system's exclusion until June 2013 of forests then added to the World Heritage List tends to confirm earlier claims that the CAR reserve system was not, in fact, comprehensive and adequate. This is highly problematic environmentally given the extent of the reliance placed on the reserve system by the TRFA and the Full Court in the *Wielangta Case.*[21]

Secondly, NAFI's latter claim of '*stringent environmental controls for the remaining [ie outside the CAR reserve system] production forest estate*' is also problematic. NAFI's submission was made in December 2008, well after the *Wielangta Case* judgments in which, as Chapter 6 explained:

- the Full Court of the Federal Court had held that merely establishing the CAR reserve system (regardless of its efficacy) was sufficient to meet TRFA cl 68 as it originally stood; and

- the High Court's refusal of special leave had determined that the amended cl 68 negated any prospects of Senator Brown's appeal against the Full Court's decision succeeding (irrespective of whether the Full Court had correctly applied the original cl 68).

In fact, as Chapter 6 explained, CAR reserves (which should be properly derived from a scientific process making them CAR not just in name, but also in nature) are a necessary, *but not sufficient*, condition for environmental protection. Off-reserve management prescriptions are also needed. Given this and the two legal outcomes

[21] *Forestry Tasmania v Brown* (2007) 167 FCR 34.

dot-pointed above, similarly difficult to reconcile with thesis Chapter 6 are the following two claims by NAFI. NAFI stated:

> Each RFA takes into account the regionally specific environmental and ecological conditions, including species composition, forest lifecycles and ecological processes, and prescribes management of forest harvesting activities accordingly. The RFAs *ensure*:
>
> - the ecological processes within forests are maintained;
> - the *biodiversity, species composition and interactions are protected and maintained*; and
> - additional environmental, social and economic benefits of forests are protected and maintained with minimal impact upon each other.[22]

NAFI further stated:

> Forest management under the RFAs reflects the biodiversity and ecological conservation sentiments expressed through the CRAs and EPBC Act. The CRAs support and underpin the framework for the RFAs and *extends beyond* the requirements of the EPBC Act, meaning the application of the EPBC Act in these regions is an unnecessary duplication.[23]

On the contrary, as Chapter 6 showed, RFA exceptionalism makes off-reserve conservation prescriptions discretionary under the TRFA, particularly in the wake of amended TRFA cl 68.

8.4.2 Dr Hawke's RFA Recommendations

Dr Hawke subsequently summarised his RFA recommendations and reasoning thus:

> To avoid duplication and uncertainty when the EPBC Act was passed, the Parliament accepted that the EPBC Act should not apply to actions taken in compliance with an RFA. This means that individual forestry

[22] National Association of Forest Industries (NAFI), Submission No 133 to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*, December 2008, 7 (emphasis added).
[23] Ibid (emphasis added).

> operations undertaken in compliance with RFAs do not need to be referred for individual assessment under the EPBC Act.
>
> Notwithstanding the benefits of RFAs, there is significant community concern that the environmental outcomes from RFAs are not being delivered. Public submissions to the Review were critical of the content and administration of the RFAs, as well as the limited mechanisms to ensure RFA forestry operations are compliant and best practice.
>
> My Report canvassed an agreed approach between environmental groups and forestry operators to redress the shortcomings. Recommendation 38 on RFAs was the second recommendation on which the Government commented at the time of releasing the Report.
>
> Given the RFA provisions of the EPBC Act operate more akin to a licence with authorisation issued on the terms outlined in the RFA, rather than an exemption, *the Commonwealth should ensure compliance with RFAs. Like other sectors, retaining the social licence to operate often requires not only doing the right thing, but being accountable and able to demonstrate it.* A key issue of concern in my Review was that the current process for review and auditing RFAs is neither independent nor transparent, and more importantly, in many cases, required reviews are not being undertaken.
>
> Long-term sustainability of the forests and forest industry require this to be rectified. Accordingly, my Report recommended that the current mechanisms for RFA forest management should be retained, conditional on better, more independent systems of performance assessment, compliance and enforcement. This would ensure the terms of the RFAs are implemented and the desired outcomes achieved. If they are not being met, then in my view the full protections of the EPBC Act should apply to forest activities.[24]

The preface to Dr Hawke's penultimate paragraph above and his emphasised extract notes that his Final Report said that EPBC Act s 38 was not so much an exemption, as a licence to undertake forestry operations in accordance with an RFA. That is how the provision reads on its face, although Hawke's Interim Report referred to 'RFA exemptions'.[25] However, little comfort can be drawn from this in practice. Firstly,

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[24] Allan Hawke, 'Review of the EPBC Act' (2011) (1) *National Environmental Law Review* 35, 39-40 (emphasis added).

[25] Department of the Environment, Water, Heritage and the Arts (Australian Government), 'Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*: Interim

Chapter 6 showed how malleable RFAs are by their government parties. Secondly, successive Commonwealth Ministers for the Environment have, referred to RFA exemptions, and treated the RFA exceptionalism provisions as such. The following table lists some examples of successive Australian Ministers for the Environment referring, in writing, to the EPBC Act's RFA 'exemptions':

Date	**Environment Minister**	**Quote (*emphasis added*)**
1 November 2007	Malcolm Turnbull (Liberal)	'I noted that section 38 of the EPBC Act exempts Regional Forest Agreement forestry operations from Part 3 of the EPBC Act.'[26]
8 December 2007	Peter Garrett (Labor)	'... a spokeswoman for the minister [Garrett] said the [Full] Federal Court [Wielangta appeal] judgment confirmed *regional forestry* [sic] *agreements were* "the principal mechanism for addressing conservation issues in forests" and were *exempt under environment protection laws*.'[27]
27 July 2009	Tony Burke (Labor)	'the full Federal Court held on appeal (in *Forestry Tasmania v Brown* [2007] FCAFC 186) that section 38 of the [EPBC Act] *exempted* the appellant's *forestry operations* from the provisions of Parts 3 and 9 of the Act.'[28]

Table 8-1 –Successive Environment Ministers' references to RFA Exemptions from EPBC Act

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Report' (Commonwealth of Australia, June 2009) <http://www.environment.gov.au/epbc/review/publications/interim-report.html>.

[26] Malcolm Turnbull, Minister for the Environment and Water Resources, Statement of Reasons for Decision to Approve the Proposed Action by Gunns Limited to Construct and Operate a Pulp Mill at Bell Bay, Tasmania and Associated Infrastructure (EPBC 2007/3385), 1 November 2007, 26 [72]: provided to this author by email from Tim Kahn, Environment Department, 2 November 2007, pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

[27] Rosslyn Beeby, 'Govt Rules Out Action to Protect Tas Forest', *The Canberra Times* (Canberra), 8 December 2007, 3, 3.

[28] Tony Burke, Letter to Bob Brown, 27 July 2009, 1.

8.4.3 Australian Government Releases the Hawke Report

Environment Minister Garrett commissioned Dr Allan Hawke to undertake the EPBC Act's 10 year independent statutory review on 31 October 2008, requesting delivery of a Final Report one year later. Dr Hawke's review was undertaken over that year and his Final Report [29] was delivered to the Minister by the end of October 2009, as requested.

On 21 December 2009 Minister Garrett released[30] the Final Report of the Hawke review, noting that it was the result of a substantive review, involving numerous submissions, and 'extensive face-to-face consultations all over Australia'.[31]

In releasing the Final Report, Minister Garrett acknowledged that,

> Dr Hawke's report examines many important and highly complex matters and these are matters that cannot be taken lightly. The Government will give careful consideration to the recommendations and their implications in the coming months.

However, in the immediately following paragraphs, the Minister announced the Government's rejection of two key Final Report recommendations, namely those:

- to introduce an EPBC Act 'greenhouse trigger' (which the Government rejected 'even as an interim measure' pending introduction of its (then) proposed emissions trading system, the 'Carbon Pollution Reduction Scheme'); and
- 'to review section 38 of the EPBC Act as it currently applies to RFAs')[32].

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[29] Allan Hawke, 'The Australian Environment Act – Report of the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*' (Final Report, Commonwealth of Australia, 30 October 2009) <http://www.environment.gov.au/epbc/review/>.
[30] Peter Garrett, 'Release of the Hawke Report' (Media Release, PG/407, 21 December 2009).
[31] Ibid 1.
[32] Ibid 1-2.

8.4.4 Dr Hawke on the Government's Release of his Report

In relation to Dr Hawke's RFA recommendation, in a subsequent conference keynote address and then paper, he said of the Government's response:

> When releasing my report, the Government said that it was committed to retaining the Act's RFA provisions as they currently stood, and committed to working with state governments to improve the review, audit and monitoring arrangements. This would include their timely completion, clearer assessment of performance against environmental and sustainable forestry outcomes, and a greater focus on compliance in the intervening years. Moreover, the Government stated its intention to use upcoming RFA renewal processes to improve the achievement of these outcomes. Having regard to all of this, the Government rejected the mechanisms proposed in recommendation 38. I look forward to seeing what happens there.[33]

Dr Hawke's final sentence said much, since very little of note had happened on that front. He concluded:

> My covering letter forwarding the Review to the Minister noted ANU survey results showing the economy and the environment as the two dominant problems facing the nation, with 56% of respondents saying that the Government is doing too little in protecting the environment.
>
> Undertaking the Review of the EPBC Act demonstrated the very real challenges ahead of us to that end.
>
> The Independent Review Report identifies significant opportunities for enhanced regulatory and environmental outcomes under a new Act.
>
> I look forward – as I am sure you do – to the Government's response to my recommendations and hope that the two rejected summarily in 2009 might be revisited in the light of subsequent events.[34]

Dr Hawke's final hope proved to be in vain, as summarised below.

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[33] Hawke, above n 24, 40.
[34] Ibid 41.

8.4.5 Government's Response to Dr Hawke's Report

On 24 August 2011, the Minister released the Australian Government response to Dr Hawke's review, but its rejection of his climate change trigger and RFA recommendations remained steadfast. Perhaps their impact on Ministerial portfolios (climate and forestry) then separate from the Environment Minister (responsible for the EPBC Act) contributed to the Governments' summary rejection of those two recommendations upon its release of Hawke's report? Bureaucratic and / or political silos could have led to rapid rejection by other Ministers or Departments of Hawke's suggestion they cede some control of their portfolio to the EPBC Act, and hence, to the Environment Minister. The Government then similarly rejected the Senate Committee recommendations for RFA reform, and in respect of climate change, as as explained above at 8.3.

The Australian Government's delay in announcing any substantive response to the Hawke Final Report after its release by Minister Garrett,[35] then its eventual response, attracted minimal mainstream media coverage: substantive reporting being limited to a few articles by two investigative journalists in the Fairfax press. This lack of media attention to the EPBC Act's first independent review under s 522A placed no political pressure on the Government to respond in a timely manner; nor to respond to Dr Hawke's recommendations in depth commensurate with his review's work. This absence of mainstream media coverage contrasts with the prominent (and often shrill) column inches devoted to covering:

- major project approval decisions under the Act (particularly in the rare cases of Ministerial rejection); and
- industry calls to cut 'red and green tape'.

[35] The Minister promised that, 'The Government will respond to all other recommendations made by Dr Hawke towards the middle of next year' (ie 2010): ibid.

Perhaps the complexities of law reform recommendations are not considered newsworthy until a Government responds. In other arenas however, such governmental delay would, in itself, be considered cause for criticism. Thus, the apparent media disinterest in the EPBC Act reviews (and their lack of Government follow up response, let alone implementation) may indicate:

- a media incapacity to understand or a lack of interest in complex law reform with long term ramifications (perhaps resulting from an obsession with the daily political cycle, leaving little room for deeper analysis beyond reporting the 'topic de jour'); and/or

- undue dependence on Government media releases to drive content.

Either reason has worrying implications for scrutiny and accountability of Government; not to mention the ongoing cost of carrying on 'business as usual' under a deficient EPBC Act while Hawke's recommendations remain unaddressed.

8.5 RFA Act Trumps the EPBC Act

Through the lens of the Tasmanian RFA, the thesis explored whether RFAs provide equivalent legal protection to the EPBC Act, as claimed by Governments and the forest industry. It was found that the EPBC Act sets a lower bar for environmental protection than one might expect from its apparently laudable objects. Some of its shortcomings are summarised below. In summary, the thesis demonstrates that RFAs do no provide equivalent protection.

In assessing the claims made by Governments and the forest industry, it is instructive to consider the court judgments examined in this thesis. These state the law more dispassionately and with greater authority than do political advocates. In particular, the Full Court of the Federal Court has delivered important judgments in the Wielangta and pulp mill cases which clarify the state of the law (subservient only to the High Court's special leave application in the Wielangta case).

The 'take home message' distilled from both judgments is that the RFA Act trumps the EPBC Act. The regime of RFA exceptionalism has been successfully entrenched by Parliament through EPBC Act ss 38-42, 75(2B) and RFA Act s 6.

Moreover, the Full Court states in blunt terms the legally limited nature of protection apparently promised in the TRFA (prior to its variation). For example, in *Forestry Tasmania v Brown* the Full Court cited the Explanatory Memoranda for the EPBC Bill and RFA Bill as indicating Parliamentary intent:

> that the Act (ie the *Environmental Protection and Biodiversity Conservation Act*) does not apply to forestry operations in RFA regions, and that the regime applicable in those regions is found in the RFAs themselves.[36]

The Court then summarised its view as to why Tasmania's cl 68 agreement to protect endangered species 'through the CAR Reserve System …' ought not be read as requiring that the species actually be protected:

> The fact that the State's obligations under Part 2 of the RFA are expressed to be unenforceable points against the view that by cl 68 the State warrants that CAR will in fact protect the species. It follows that satisfactory performance of the State's obligations can only be measured by the parties, the sanction for inadequate performance by the State (in the Commonwealth's opinion) being termination of the agreement under cl 102.
>
> The background to the RFA, constituted by the JANIS report and the RFA's recitals, confirms the view that the State was not by cl 68 giving the warranty referred to at [63]. The JANIS report and the RFA reflect a compromise between employment and forest industry concerns on the one hand and the environment on the other. Neither concern could be entirely met. *There were some limits imposed on forest operations, but operations would continue, and to that extent there was no guarantee that the environment, including the species, would not suffer as a result. Why in those circumstances would the State give a warranty that it could see was unsustainable?*[37]

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[36] *Forestry Tasmania v Brown* (2007) 167 FCR 34 [63].
[37] Ibid [63]-[64] (emphasis added).

It is doubtful that the Court meant 'unsustainable' in an environmental sense, but that is the effect of its judgment. It is very difficult to see how a forestry regime which leaves the environment, including endangered species, to suffer (further) can truly constitute 'ecologically sustainable forest management'. However this objective of the RFA scheme is, on the Full Court's interpretation to the TRFA (pre 2007 variation), not enforceable under Commonwealth law (even, presumably, by the Australian Government, let alone third party ENGOs). All that the Court legally required of Tasmania under the TRFA was a CAR Reserve System.

The majority of the Full Court in the pulp mill assessment case[38] took a similar approach to that in *Forestry Tasmania v Brown*. Given the denial of Senator Brown's special leave application by the High Court majority (and the dissenting Kirby J having now retired),[39] these two Full Court judgments authoritatively state Australian law in respect of the Tasmanian RFA and the statutory dominance of the RFA Act's regime over the EPBC Act due to RFA exceptionalism.

For threatened species reliant on habitat outside the Reserve System, this has dire consequences. The TRFA does not enable its management prescriptions, embodying some of the vital off-reserve conservation measures recognised as essential by scientists[40] to be legally enforced against forestry operations.

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[38] *The Wilderness Society Inc v Minister for the Environment and Water Resources* (2007) 166 FCR 154.
[39] Transcript of Proceedings, *Brown v Forestry Tasmania* [2008] HCATrans 202 (23 May 2008).
[40] See eg David Lindenmayer, 'The Conservation and Management of Ecological Communities' in John Mulvaney and Hugh Tyndale-Biscoe (eds), *Rediscovering Recherche Bay* (Academy of the Social Sciences in Australia 2007) 145.

8.6 RQ1 Answer: Do RFAs Provide EPBC Act Equivalent Protection?

The thesis chapters progressively work through the EPBC Act, RFA Act, FPST, then MNES impacted by RFA forestry operations in Tasmania (World Heritage and threatened species), including showing how adverse impacts of RFA forestry operations are excluded from EIA and approval of downstream wood-processing projects. Given the findings of the thesis' chapters, its RQs and associated hypotheses can now be answered, as follows.

In relation to RQ1, H1 and the SOFR claim that RFAs provide equivalent protection to the EPBC Act, it is worth considering how the EPBC Act would apply to forestry operations *but for* RFA exceptionalism. A forestry operation would need to be referred to the Australian Environment Minister if a person proposing to undertake it thought it 'may be or is a controlled action'[41] (ie it is likely to or will significantly impact on a MNES).[42]

The Minister must publish a referral online, and invite public comments within 10 business days on whether the action is a controlled action.[43] This is a very short time for members of the public to hear of the referral's advertisement and then make informed comment on what could be complex and voluminous referral documentation in the case of a major project. The Minister then needs to decide if the action constitutes a 'controlled action'. While the Minister must 'consider' any comments received within the (limited) time allowed[44], this imposes little more than a procedural requirement – the Minister is not bound to be swayed by public submissions: s/he must simply consider 'all adverse impacts (if any) the action' has,

[41] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68.
[42] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 67.
[43] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 74(3A).
[44] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(1A).

will have or is likely to have on the 'matter protected' by MNES provisions in Pt 3 of the Act.[45]

In making this controlled action decision under s 75, the Minister must take account of the precautionary principle,[46] as defined in EPBC Act s 391(2). If the Environment Minster decides that a referred action is a controlled action, then s/he must decide a suitable method of environmental assessment and ultimately make an approval decision under EPBC Act s 133. The approval decision must only[47] take into account a number of 'General considerations' listed in s 136, and specific requirements for individual MNES in ss 137-140. These factors include, inter alia, the 'principles of ecologically sustainable development'.[48] In addition, the Environment Minister is specifically required to take account of the precautionary principle, 'to the extent he or she can do so consistently with other provisions of this Act.'[49]

'Must' is much more clearly mandatory than 'shall', the meaning of which lies somewhere in between 'must' and 'may'. Notwithstanding that, the phrase 'must take into account' the principles of ESD[50] remains at the weak end of a spectrum of legal requirements, for two reasons. Firstly since the Act's phrasing of each principle in s 3A is itself prefaced by 'shall' (which should be deleted to render the language of the principles neutral) this may undermine the 'must' in s 136(2)(a). Secondly, 'take into account' is much weaker than the objective duty 'must not act inconsistently with' applicable to the international treaty obligations specified in ss137-140. A well written statement of reasons in which the Minster confirms that he did take into account the principles of ESD makes it very difficult for an applicant to successfully challenge under the *Administrative Decisions (Judicial Review) Act*

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[45] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 75(2).
[46] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 391(1), (3).
[47] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136(5).
[48] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136(2)(a).
[49] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 391(1), (3).
[50] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136(2)(a).

1977 (Cth), unless the decision is so manifestly unreasonable as to meet the high threshold required for *Wednesbury* unreasonableness.

That said, if RFA exceptionalism were repealed, then the Environment Minister, in deciding whether to approve forestry operations, would, at least as a matter of law, need to take into account all the 'principles of ecologically sustainable development' listed in EPBC Act s 3A.[51]

Since these principles largely match the principles of ESD which Prof McDonald applied to the RFA process, her work has direct relevance when considering, in this context the subsequent claim by governments and industry in the SOFR that RFAs provide equivalent protection to the EPBC Act.[52] Prof McDonald identified a number of failures of the RFA process to properly comply with certain principles of ESD (eg the precautionary principle). To the extent that RFAs do not take into account all the EPBC Act s 3A principles of ESD, RFAs do not provide environmental protection for forests equivalent to that of the EPBC Act (if absent RFA exceptionalism).

8.6.1 Hypothesis 1 Rejection

Given the above, H1 which hypothesised RFA – EPBCA Act equivalence, can be rejected as evidenced by the inadequacies of the RFA regime in terms of environmental protection and as compared to the EPBC Act. For example:

(a) The RFA regime does not protect areas of outstanding universal value (eg those of the TWWHA extension, only listed in June 2013, after decades of RFA-compliant logging in them). Whereas at least the EPBC Act protects world heritage values in World Heritage listed (declared) or nominated properties (notwithstanding its shortcomings), as evidenced by Chapter 5.

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[51] *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 136(2)(a).
[52] Montreal Process Implementation Group for Australia, 'Australia's State of the Forests Report 2008' (Bureau of Rural Sciences, 2008) <http://adl.brs.gov.au/forestsaustralia/publications/sofr2008.html>.

(b) The RFA regime does not ensure off-reserve protection for nationally-listed threatened species. On the contrary, by the TRFA cl 68 the Commonwealth and Tasmania agree endangered species to be protected, as demonstrated in Chapter 6. DAFF's evidence to the Senate Committee confirmed that under TRFA clause 68 species can be driven to extinction, quite legally under federal law.

(c) The RFA Act and RFAs do not enable third party enforcement (prevented for RFAs by privity of contract).

(d) RFAs, although created under the RFA Act, are not subordinate legislation, but rather, mere inter-governmental agreements. They are therefore more contractual than legislative, or even administrative, in nature. As such, they are too easily amended by the governments of Australia and the relevant State without opportunities for public input, expert assessment or other procedural safeguards. This enables their protective provisions to be drastically weakened through bilateral agreement, as exemplified by the TRFA cl 68 variation during the *Wielangta Case*.

The RFA Act, s 10(3) requires tabling in both Houses of the Australian Parliament of a report regarding a variation to an RFA, as occurred in relation to the Variation of the TRFA during the *Wielangta Case*. This was no obstacle to that TRFA variation.

In contrast to (a) and (b) above, the EPBC Act, unlike the RFA exemptions, at least protects (albeit inadequately) from significant impacts the matter protected for MNES such as world heritage values and threatened species. Furthermore:

(i) In contrast to (c) above, the EPBC Act acknowledges the important role of third party 'surrogate regulators' and empowers them with relatively open standing (albeit other procedural obstacles remain) to pursue civil

enforcement through injunctions, declarations and other remedies available through applications for judicial review.

(ii) The EPBC Act is prominent as Australia's omnibus environmental statute, and hence amendments to it can be expected to attract expert examination and comment by special interest constituencies.

The logical, simplest and most efficient solution to ensure EPBC Act - RFA equivalence in terms of environmental protection would be repeal of the RFA exceptionalism provisions, thereby applying the EPBC Act to RFA forestry operations, as for other industries.

8.7 RQ2 Answer: Is Australia Breaching International Treaty Obligations?

The second research question this thesis sought to answer was where does RFA exceptionalism and its resultant legal position leave Australia vis-à-vis its obligations under international environmental law. Each of Chapters 5-7 started at the international level setting out the key legal obligations under the relevant MEA(s) to which Australia is a party, then progressed through the EPBC Act to a Tasmanian-based case study of forestry impacting that MNES.

As set out above, the Full Court of the Federal Court in *Forestry Tasmania v Brown* viewed the TRFA as involving a trade-off between forestry operations and the environment (specifically the endangered species at stake in that case, a subset of the 'Priority Species' listed in the TRFA), confirming that forestry '*operations would continue, and to that extent there was no guarantee that the environment, including the species, would not suffer as a result*.'[53]

[53] *Forestry Tasmania v Brown* (2007) 167 FCR 34 [64] (emphasis added).

DAFF's answers to the Senate Committee set out at 8.3.2 above show there is no guarantee that species will not be driven to extinction by forestry, and if they are then legally, the federal government may not intervene, since by TRFA cl 68 both governments now agree that Tasmanian species are protected.

Clearly, the extinction risk acknowledged by DAFF, while the Australian and Tasmanian Governments rely on RFA exceptionalism and their cl 68 legal fiction that endangered species are protected to remove legal remedies runs counter to Australia's obligations under the *Convention on Biological Diversity*[54] eg arts 8(d), 8(f) and *Apia Convention*[55] arts 1 and 3 as set out in Chapter 6 at sections 6.2.1 and 6.2.2.

Similarly, as Chapter 5 showed, RFA exceptionalism places Australia in breach of *World Heritage Convention*[56] eg arts 4 and 5 set out in Chapter 5 at section 5.2.1.

The fundamental duty of nations to perform their treaty obligations in good faith, recognised in the *Vienna Convention on the Law of Treaties*,[57] was explained in Chapter 2. Australia's convention breaches in respect of World Heritage and threatened species also breach that fundamental norm and hence, the VCLT.

Furthermore, as to the development of international law norms, it is interesting to contrast the Federal Court of Australia's concise (almost blunt) summary above of

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[54] *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).
[55] *Convention on Conservation of Nature in the South Pacific*, opened for signature 12 June 1976, [1990] ATS 41 (entered into force 26 June 1990).
[56] *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*').
[57] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26.

the [T]RFA scheme with the following statement by the International Court of Justice in its order in its first *Pulp Mills Case*.[58] The ICJ stated that:

> Whereas the present case highlights the importance of the *need to ensure environmental protection* of shared natural resources while allowing for sustainable *economic* development; … the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development; … *the need to safeguard* the continued conservation of the river environment and the rights of economic development of the riparian States …[59]

The approach in this passage may be viewed as elevating the '*need to ensure environmental protection'* to a position in international law (at least in disputes over shared resources) from which it then allows only economic development which is 'sustainable'. Although the principles of sustainable development may not yet enjoy sufficient State practice and *opinio juris* to be definitively crystallized as norms of customary international law, the ICJ's statement represents a step along that path. However, reliance on custom is not necessary to prove this thesis' argument given Australia's breach of treaty obligations.

As Chapter 2 explained, Australia holds itself out as a good global citizen (stated by its former Foreign Minister), and a supporter of international environmental law. However, the breaches of treaty obligations identified above (eg breaches of MEAs with near universal State Party membership in the *World Heritage Convention* and *CBD*) refute that claim, at least insofar as Australia's implementation and application of them forestry is concerned.

8.7.1 Hypothesis 2 Rejection

Recall H2 hypothesised that RQ2 is answered in the affirmative:

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[58] *Pulp Mills Case (Provisional Measures) (Argentina v Uruguay)* ICJ Reports (2006).
[59] Ibid para 80 (emphasis added).

H2: The EPBC Act, RFA Act and RFAs provide sufficient environmental protection for the Australian Government to ensure that forestry operations do not derogate from fulfilment of its international obligations set out in the relevant MEAs implemented in Australian law by the EPBC Act.

The treaty breaches identified above in relation to RQ2 enable Hypothesis 2 to be rejected. Given the systemic shortcomings in the RFA regime, and the EPBC Act, particularly RFA exceptionalism, the Commonwealth Government (which has acknowledged its international environmental responsibilities in the past (see Chapter 2)) should use its undoubted Constitutional capacity to fix its non-compliant statutes and fully implement its treaty obligations, to ensure they extend to forestry regulation.

8.8 Further EPBC Act Shortcomings Highlighted by Thesis

Beyond its RFA exceptionalism, the EPBC Act has a number of shortcomings, many of which were identified by Dr Hawke, and some of which have been highlighted during this thesis. These further weaken the Act, and to that extent, potentially undermine environmental protection and Australian fulfilment of the international treaties the Act purports to implement. For example:

1. The Act's primary and some other key objects in s 3 are prefaced with 'provide for', weakening them (Chapter 6 and earlier this chapter).

2. The word 'should' is embedded in each of its s3A principles of ESD, rendering them inherently discretionary rather than potentially mandatory in certain decisions (Chapter 2 and earlier this chapter).

3. The Act's restriction to MNES promotes fragmentation within a federal system where important impacts can fall between the crack and fail to be adequately assessed (Chapters 2 and 7).

4. The Act's approval provisions prevent holistic environmental decision-making, thus ensuring that total social and economic benefits invariably outweigh an incomplete basket of environmental costs. The pulp mill case study exemplifies this problem par excellence (Chapter 7).

Law reform recommendations to address the above have been detailed in relevant chapters, and are summarised below at section 8.9.4. Points 2 and 4 are also pertinent to the next problem.

8.8.1 Excessively Discretionary Ministerial Decision-Making

As demonstrated, eg in Chapter 6, the EPBC Act relies extensively on Ministerial decision-making for its operation. Ministers granted such discretion (albeit required to exercise it legally) wield substantive power under Australian law, greater than in many equivalent nations. For example, Australia's 'Washminister' system of government is closer to Washington than Westminster in that Australia lacks the separation of powers to the extent of the US (particularly between the legislative and executive arms of government).[60]

Australia also lacks a Bill of Rights, so constitutional protection of human rights relies largely on the High Court's implied rights jurisprudence. Although signatory to various human rights conventions, Australia is not subject to the enforceable oversight of a regional body such as the European Court of Human Rights or the Inter-American Court of Human Rights. While some States and territories have passed human rights Acts declaring charters of rights, calls for a national human rights Act have fallen on deaf ears.

[60] the party which dominates the Lower House of Parliament forming government and selecting Ministers from within its elected ranks.

In this context, the fact that the EPBC Act's major EIA and approval decisions are made by the Minister, advised not by an independent EPA (there is none at the federal level) but by his own Department, suggests, ideally, the need for a more independent apolitical decision-maker with specialist expertise more inclined to follow the law than to favour sectional interests. But such a recommendation by the Hawke Review was rejected by the Federal Government.

8.8.2 Lack of Merits Review

In terms of its third party rights, the EPBC Act is a vastly superior to the RFA regime. Privity of contract and the RFA Act freeze out ENGO third parties, and enable RFAs to be varied at the whim of their two Government parties (as exemplified by the TRFA cl 68 variation after the trial judgment in *Brown v Forestry Tasmania*).[61] However merits review rights for many key EPBC Act decisions were removed from it in 2006.

In terms of merits review, Dr Hawke summarised his report's recommendation and reasoning thus:

> **Merits review**
>
> The original Act allowed for merits review of a limited range of decisions made by the Minister or a delegate. The 2006 amendments removed the ability to seek merits review of any decisions made by the Minister.
>
> Arguments were put forward in submissions both for and against extending merits review to ministerial decisions, and in favour of expanding the types of decisions open to merits review. On balance, my recommendation 48 proposes that the 2006 amendments concerning merits review be reversed.
>
> Merits review has never been available for any of the key decisions about environmental impact assessment and project approvals made under the EPBC Act. The weight of submissions received by the Review was in favour of an expansion in the scope of merits review to all decisions, or at

[61] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34.

> the very least, key decisions under the Act. I concluded that project approval decisions made under s 133 of the Act should not be open to merits review, but should remain open to judicial review.
>
> I also considered whether those decisions that are preliminary to the project approval decision under s 133 – namely, the controlled action decision and the assessment approach decision – should be open to merits review. Opening the controlled action and assessment approach decisions to merits review should provide greater transparency and accountability.
>
> The current system is predicated on proponents being able to get a quick answer as to whether their project falls under the EPBC Act. Merits review would slow down this part of the process and undermine the role of the Minister as the elected decision maker.
>
> Noting both the potential costs and benefits associated with merits review of controlled action and assessment approach decisions, I recommended the Government give further consideration to this issue.[62]

Dr Hawke accurately identified shortcomings and the need for merits review to be reinserted in EPBC Act decisions from which it was excluded in 2006. Similarly, these EIA and approval decisions lack merits review rights which exist in some other areas of the EPBC Act and have long existed:

- for most State environmental and planning decisions;[63] and
- for most federal administrative decisions (pursuant to the AAT Act or specialist tribunals such as the Refugee Review Tribunal).

Even local government planning decisions, when discretionary (rather than permitted as of right) are almost invariably subject to a right of merits appeal (in eg the NSW Land and Environment Court, Victorian Civil and Administrative Tribunal, Resource Management and Planning Appeal Tribunal in Tasmania, etc). Yet for developments

[62] Hawke, above n 24, 41.
[63] States such as NSW resourcing a specialist Land and Environment Court, while Tasmania has a Resource Management and Planning Appeal Tribunal and Tasmanian Planning Commission, each with its own enabling Act.

significantly impacting Australia's internationally and nationally recognised MNES, the EPBC Act allows no merits appeal.

This leaves those disappointed by EPBC Act decisions (be they developers or ENGOs) reliant on judicial review in the Federal Court, where it has proven very difficult to overturn environmental decisions (as exemplified in the pulp mill case). Judicial review provides some procedural protections, but it is notoriously difficult for an applicant to succeed against a well drafted statement of reasons (see eg the pulp mill case), which is invariably written so as to justify the Minister's preferred decision, rather than to necessarily reflect his or her true (eg political) motivations.

8.8.3 Other Barriers to Public Interest Litigation

While some barriers to public participation have been reduced under the EPBC Act (eg relatively open standing – see Chapter 6), others have been resurrected (eg undertakings as to damages for injunctions revived by EPBC 2006 amendments) or remain (eg the risk of prohibitive cost orders).

Fundamentally, despite some small steps in receptiveness to public interest litigation over the years, the Federal Court remains an expensive, intimidating and inhospitable environment for public interest environmental matters. Key EPBC Act assessment and approval decisions should be subject to a right of appeal to the AAT or a specialist division thereof.

Yet, again, just such a recommendation from the Hawke Review was rejected by Environment Minister Burke, who dismissingly described it as a "lawyers' picnic". This is a cheap shot, demonstrating little regard for the role of public interest lawyers or community legal centres in protecting the rights of their clients. Moreover, it masks an unwillingness to allow oversight of Ministerial power. One might infer that Governments prefer decision-making power to remain concentrated in Ministerial hands, without the potential for merits review by a more independent authority.

A decade ago Roland Browne concluded of public participation in Tasmanian forestry law:

> Public involvement in forestry decisions is greatly emasculated in Tasmania.
>
> Yet in various parts of Australia States have opened up environmental protection legislation to permit public participation and enforcement. A prominent example is s. 123 of the NSW *Environment Planning and Assessment Act* which reads:
>
> "(1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach."
>
> There is no evidence this provision has proved deleterious.
>
> Further, in this age of self-regulation, and where the self regulators are lacking in resources and motivation, public accountability ought to be encouraged, not feared.
>
> But as Justice Kirby recently observed in the course of argument in the High Court (adopting the words of Sir William Deane, a former Justice of the High Court),
>
> "When the land below is parched, it is not a bad thing to open the floodgates".[64]

The same sentiments are applicable to public involvement in federal regulation of forestry.

8.9 Thesis Law Reform Recommendations

Were it not for the RFA exemptions, the EPBC Act could provide a reasonably robust framework for protection of MNES, albeit that even its protective regime suffers weaknesses due to 'devil in the detail', much of it resulting from the

[64] Roland Browne, 'Forestry Exemptions' (Paper presented at the Unlocking the Gates Conference, Hobart, 2002) <http://www.edo.org.au/edotas/>, 5-6 (citations omitted).

December 2006 amendments. A number of these, and other, deficiencies have been identified by the Act's 10 year statutory review.[65]

These are only a small fraction of the reforms which would improve the EPBC Act. Many other reforms, beyond the scope of this thesis, are needed, a number of which were recommended by the first ten year statutory review of the Act. The reforms recommended in this thesis would, nonetheless, be significant. For reasons explained herein, they would constitute a substantial step forward in Australian federal regulation of forestry, and thereby better equip the EPBC Act to realise its objects in respect of environmental protection and ecologically sustainable development.

8.9.1 A 'Root and Branch' Review of the RFA Act

In September 2012 Australian Government's Minister for Agriculture, Fisheries and Forestry, Minister Joe Ludwig, held a press conference in conjunction with the Environment Minister Tony Burke to announce the Government's response to the controversial super trawler *FV Margiris*. The Environment Minister's immediate legislation to extend the EPBC Act to enable the Government to better regulate the vessel is discussed below at 8.9.2. The Fisheries Minister simultaneously announced 'a root and branch review' of the *Fisheries Management Act 1991* (Cth), citing the age of the Act and community expectation as key reasons for doing so:

> What I'm also announcing today is a review – a root and branch review of the Fisheries Management Act. Why? Because the legislation came through in the 1980s, brought through in the 1990s and so for the last twenty years we've been operating under that legislation. It's clear to me that after twenty years of operating that legislation that there is now community expectation about how we should continue to have the world's best managed fisheries. So to do what [sic] I will consult with

[65] Hawke, above n 29.

> stakeholders, consult with the community to continue to ensure that we've got confidence in our fisheries management.[66]

The Minister's arguments are applicable to the RFA Act for which he is also responsible: it is over a decade old, the RFAs it entrenches were negotiated and concluded in the 1990s, and there is very little community confidence in RFAs. The EPBC Act contains a statutory requirement for ten yearly independent reviews of it: so should the RFA Act.

Indeed, the first EPBC Act statutory independent review has already recommended reforms to the RFA regime. One small additional suggestion is recommended below, but a root and branch review of the RFA Act and RFAs could generate further recommendations for improvement. It would also be timely in Tasmania if forestry 'roundtable' negotiations (still continuing at the time of writing) produce a result requiring further variation or rewriting of the TRFA.

8.9.1.1 Make RFAs and Variations Disallowable Instruments

A new RFA or an amendment of an RFA must be tabled in each House of the Australian Parliament within 15 sitting days of it being made.[67] This tells Parliament the result (though not necessarily the process behind it), but without a disallowance power it is inadequate for effective Parliamentary oversight of executive conduct which carry such important potential consequences. Hence, one small but powerful extension to this process would be to make both an RFA and an RFA variation a disallowable instrument, as applies to legislative instruments under the *Legislative Instruments Act 2003* (Cth). This would provide some teeth to Parliamentary scrutiny of future RFAs or variations of existing RFAs.

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[66] Senator Joe Ludwig, Minister for Agriculture, Fisheries and Forestry, Press Conference, 11 September 2012, <http://www.environment.gov.au/minister/burke/2012/tr20120911a.html>
[67] *Regional Forest Agreements Act 2002* (Cth) ss 10 (1)-(3).

However, it was Parliament which passed the RFA Act, so its oversight is no guarantee that Australia's international obligations will be respected (particularly given the bipartisan support of Australia's two major political parties for the RFA Act and individual RFAs).[68] Furthermore, as this thesis has demonstrated, RFAs already contain environmental flaws (eg new cl 68 remains current) which a purely prospective RFA disallowance power will not remedy, and could perversely entrench.

Accordingly, an RFA disallowance power should not be a substitute for repeal of the RFA exemptions as this thesis has advocated. Furthermore, such a power should extend to provide Parliament (within a specific period from its commencement) an opportunity to consider and disallow a current RFA. If used, this retrospective power would then place the onus on the federal and relevant State Governments to make a new RFA having regard to the reasons raised in debate over Parliament's disallowance.

Such a disallowance power applied to current RFAs could transform Parliamentary scrutiny of them from toothlessly noting their tabling under RFA Act s 10 to a procedure with real bite, and far more consistent with procedures applicable to regulations under the *Legislative Instruments Act 2003* (Cth).

8.9.2 Repeal RFA Exceptionalism Provisions in EPBC and RFA Acts

Implementing the above RFA Act recommendations, in addition to those of the Hawke Review, would improve the regime somewhat, but insufficiently to address the problems identified by this thesis. For example, they would not ensure compliance with the principles of ESD set out in the EPBC Act, and Australia's international environmental obligations. Neither would they change the fundamental

[68] Ajani, above n 4, 218-240.

structure of RFAs: bilateral agreements between governments, without the backstop of third party enforcement where governments fail to comply. Accordingly, reform of the RFA Act and RFAs can be seen as a necessary, but not sufficient, condition to remedy these systemic flaws.

The fundamental reform this thesis recommends is repeal of RFA exceptionalism provisions, ie: EPBC Act ss 38-42, 75(2B) and, at least, RFA Act s 6(4).

8.9.3 Apply RMPST protections to the FPST

Following similar reasoning to that above, a similar recommendation for forestry law reform in Tasmania is to repeal exemptions for forest practices from Tasmania's other environmental and planning laws which make up the RMPST. Specific exemptions for the FPST from the RMPST were identified in Chapter 4.

For example, *Forestry Act 1920* (Tas) ss 22C(3), (4) ought be repealed. They read:

> **(3)** Subject to this Part, a forest management plan may prohibit or restrict the exercise of a statutory power in respect of the land to which it applies.
>
> **(4)** Subsection (3) has effect notwithstanding any other enactment.

8.9.4 Other Improvements to the EPBC Act

From the relevant statutory provisions and cases studies analysed, the thesis identified some other key inadequacies in the EPBC Act.[69] Some of these are briefly summarised below, particularly as those relating to the Act's objects, principles of ESD and third party appeal rights.

[69] A much broader, more comprehensive analysis of the RFA Act overall is contained in Hawke, above n 29.

8.9.4.1 Strengthen EPBC Act Objects eg by Deleting 'provide for'

The Act's objects s 3(1)(a) and (ca) are prefaced by the phrase 'provide for'. As explained in Chapter 6, *Brown v Forestry Tasmania*[70] made clear that this phrase waters down (compared to simply 'provide') the words which follow. It follows that the 'provide for' preface to s 3(1)(a) and (ca) undermine the otherwise laudable objects which follow. Accordingly, the EPBC Act objects should be amended, as recommended by the Senate Committee and the Hawke Review. The Gillard Labor Government's response to the Senate Committee rejected the Committee's recommendation, stating:

> The Australian Government does not agree to amend the objects of the Act. The government view is that the objects of the EPBC Act are already sufficiently clear and that there is no need to change them at the present time.[71]

This is manifestly unsupportable. For reasons such as above, and due to the absence of any clear priority between potentially competing objectives, the Senate Committee and Hawke Review both found that the legal effect of the objects as currently drafted warranted at least clarification. Dr Hawke went further in his report's recommendations. As he later told a conference of the National Environmental Law Association (which this author attended):

> Some of your legal colleagues were instrumental in formulating recommendation 2 which proposes a clarification of the EPBC Act's objects to sharpen its focus. As part of giving the new Australian Environment Act a much clearer sense of direction, the Act will have *a primary object to protect the environment through the conservation of ecological integrity and nationally important biological diversity and heritage through applying the principles of ecologically sustainable development*.

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[70] *Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34.
[71] Australian Government, 'Australian Government Response to the Senate Standing Committee on Environment, Communications and the Arts Committee Report: Operations of the *Environment Protection and Biodiversity Conservation Act 1999* (First, Second and Final Reports)' (2011) <http://www.environment.gov.au/epbc/publications/epbc-operations-govt-response.html>, 1.

> The proposed objects are intended to ensure the Australian Government's focus for environmental matters is on nationally important biodiversity and heritage, while recognising that the Commonwealth does not and should not act in isolation in managing the environment. The Commonwealth should take a leadership role in protecting matters of national environmental significance, but protection of these matters requires the cooperation of all levels of government and the broader community.[72]

Dr Hawke's recommendation 2 makes good sense, and his explanation of the need for it above (more detailed in his report) shows the Government's rationalisation for rejecting it to be hollow.

8.9.4.2 Delete 'should' to Strengthen the Act's 'principles of ecologically sustainable development' (ESD)

The wording of each of the 'principles of ecologically sustainable development' (ESD) in EPBC Act s 3A is embedded with the discretionary preface 'should'. This waters down each of the principles, making it very difficult to draft subsequent machinery provisions to mandate application of the principles' substantive content, certainly not in a legally enforceable obligation to comply with the principles. For example, EPBC Act s 136(2) requires that, in her/his ultimate project approval decision, the Minister 'must take into account', inter alia, 'the principles of ecologically sustainable development'. That appears mandatory, but the discretionary 'should' embedded in each of the s 3A principles of ESD conflicts with 'must' in s 136(2). This conflict produces ambiguity as to how the mandatory 'must' and discretionary 'should' operate when combined as via s 136(2). It seems likely that 'should' in the s 3A principles acts as a 'weasel word' to undermine the strength of the otherwise mandatory requirement s 136(2) that the principles must be taken into account. If so, this current incapacity for later sections to make application of the s

[72] Hawke, above n 24, 37 (emphasis added).

3A principles mandatory also undermines the Act's environmental protection object s 3(1)(a).

Therefore, the embedded word 'should' ought to be deleted from each of the s 3A principles to make their definitions neutral. This would increase drafting flexibility by enabling either 'must' or 'may' to preface operational provisions applying the principles later in the Act, making them either mandatory or discretionary, respectively.

8.9.4.3 Consistency with International Obligations

EPBC Act ss 137-140 currently require that in deciding whether or not to approve the taking of an action and what conditions to attach to an approval, 'the Minister must not act inconsistently with' Australia's obligations under various specified treaties and domestic management principles and plans.

These provisions should be amended to remove their double-negatives by replacing 'not act inconsistently' with 'act consistently'. The provisions could be further simplified by applying them, not merely to the Minister's conduct, but directly to the substance of his approval. This should strengthen ss 137-140 by making clearer that unless an approval is consistent with Australia's international obligations (and the domestic principles and plans to which the provisions already refer), then the approval is invalid. It may be that these amendments to ss 137-140 could be most simply achieved by replacing the provisions with a new single section.

As argued in Chapter 4, the EPBC Act's World Heritage provisions should be amended to ensure that they adequately implement all of Australia's obligations under the Convention.

8.9.4.4 Expand Use of the Commonwealth's Corporations Power

Some EPBC Act protections, most notably those concerning national heritage, are not obviously supported by the external affairs power. Currently, the drafting of EPBC Act national heritage provisions is quite tortuous in the lengths it goes to obtain support from other constitutional heads of power, resulting in provisions which are complex, and also weak in terms of the protection they provide national heritage.

As explained in Chapter 2, the extent of the Commonwealth's corporations power,[73] apparent from the High Court's decision in the *Work Choices Case*,[74] goes far beyond the use made of it in the EPBC Act. Accordingly, the EPBC Act's environmental protections, particularly for national heritage, could be strengthened by making much stronger use of the corporations power. Most, and especially the most major, significant impacts on MNES will involve a Constitutional corporation at some point of the 'action'. The s 523 definition of action includes an 'activity or series of activities' and their alteration.

Even where land is owned by natural persons, where a Constitutional corporation (eg a contracted company) is involved in an action which significantly impacts on MNES, they could be subject to new provisions founded on the corporations power. Suitably worded provisions to catch the corporation's involvement could make it difficult for the overall 'project' also included in the s 523 definition of 'action') to be completed without EPBC approval.

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[73] Used in addition to the external affairs power in *Tasmanian Dam Case* (1983) 158 CLR 1 and subsequently even more widely interpreted:.

[74] *New South Wales v Commonwealth* ('*Work Choices Case*') (2006) 229 CLR 1; see eg Justice Robert J Buchanan, 'The Shifting Balance in Federal/State Relations: Its Impact on the Australian Judicial System' (2012) 31(1) *University of Tasmania Law Review* 1 and Chapter 2.

8.9.5 Australian Forestry and Fisheries Legislation Compared: '… when the law falls short you change the law' – Environment Minister Tony Burke

Australian forestry law reform, particularly to repeal RFA exceptionalism is probably unlikely in the short term. However, this section compares forestry to fishing, another resource industry but which is subject to the EPBC Act and saw rapid strengthening of the EPBC Act when deemed necessary by government. So the possibility of a 'Berlin Wall' moment for Australian forestry should not be ruled out.

In stark contrast to forestry, the EPBC Act 'requires the Australian Government to assess the environmental performance of fisheries and promote ecologically sustainable fisheries management' [75] and to this end provides the Environment Minister with regulatory power over fisheries.[76] This is so notwithstanding:

- the *Fisheries Management Act 1991* (Cth) (far more substantial legislation than the RFA Act) which, inter alia, establishes an independent statutory authority, the Australian Fisheries Management Authority; and

- the Australian Government containing a separate Department of Agriculture, Fisheries and Forestry which reports to its own Cabinet Minister.

Yet in September 2012 the Australian Government's Environment Minister, Tony Burke (formerly the Minister for Agriculture, Fisheries and Forestry), found himself with insufficient power under the EPBC Act to adequately regulate 'super trawlers',

[75] Environment Department of Sustainability, Water, Population and Communities, Australian Government, *Fisheries and the Environment* (21 September) <http://www.environment.gov.au/coasts/fisheries/>.
[76] See eg RFA Act Pt 10 Div 2 ss 147-154, Pt 13 and Pt 13A.

specifically the Dutch-owned vessel '*FV Margiris*' [77] against which fishing organisations and ENGOs were campaigning.

Minister Burke announced he would rapidly (within the week) introduce EPBC Act amendments to give the Environment Minister a greater say in Commonwealth fisheries management to address perceived inadequacies in his statutory powers. The Minster told Parliament in Question Time:

> To make sure that we are properly maintaining the protection of the ocean that we need, for the fish stocks, but also for the significant issues of by catch whether it be dolphins, whether it be seals, whether it be sea lions, whether it be sea birds. Making sure that the correct protections are put in place was the reason that some weeks ago I asked my department for advice to see what the limits of my legal powers were at the moment to be able to have a highly precautionary approach to this issue.
>
> That advice came back last Monday and as members would be aware that I put some extra conditions in place but the legal power fell well short of where I had hoped it would be. That's why I have announced today that *when the law falls short you change the law* and we will be changing the law and moving legislation in this parliament today to be able to provide extended powers over this particular vessel.
>
> There has been a huge outcry of public interest in this where people have seen the dangers if something goes wrong. Whether it be people with environmental concerns, whether it be the huge recreational fishing community that's been concerned at wanting to make sure that their fish stocks remain in place.
>
> I hear people calling out risk, but you never hear them calling out environmental risk. And I don't know what their problem is with the oceans. Why is it that when we try to protect it in this case they are against it, when we put in national parks they are against it, when we fight with Campbell Newman over protecting the Great Barrier Reef they are against it.
>
> You need to have a cautious approach, *you need to adopt a precautionary principle* in dealing with the oceans. …[78]

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[77] ABC TV, 'The Super Trawler', *4 Corners*, 22 October 2012 <http://www.abc.net.au/4corners/stories/2012/10/18/3613408.htm>

Applying similar oceanic logic to forests would see the former Minister (who has to date opposed recommendations to amend the statutory regime of RFA exceptionalism)[79] legislate to reform it. The EPBC Act is used as an essential part of the fisheries management toolkit, and extended where necessary for this purpose, but exempts RFA forestry. Both fishing and forestry practices impact non-target species and other values of national environmental significance, raising serious questions of scale and uncertainty. Accordingly, the precautionary principle (and other principles of ESD) ought be applied to both. Yet as Prof McDonald identified, under the heading 'Scientific basis and the precautionary principle':

> A range of social and political factors will influence the final content of an RFA, but the legitimacy of the RFA outcome hinges upon its scientific basis. The release of the options reports of the comprehensive regional assessments have typically been accompanied by public statements about the comprehensive scientific base that they represent. *Yet there are serious flaws in the information underpinning the RFAs undertaken to date and the scientific process by which information has been gathered. These flaws call into question the capacity of the concluded RFAs to observe the precautionary principle.* [80]

Since the precautionary principle is already embedded in the EPBC Act s 391, the simplest, most efficient and equitable method to apply it (and other principles of ESD) to RFA forestry would be repeal of the provisions which entrench RFA exceptionalism. This would also provide another safeguard by prohibiting approval of forestry operations in breach of Australia's international environmental obligations.[81]

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[78] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 2012 (Tony Burke) <http://www.environment.gov.au/minister/burke/2012/tr20120911.html>

[79] Australian Government, 'Australian Government Response to the Senate Standing Committee on Environment, Communications and the Arts Committee Report: Operations of the *Environment Protection and Biodiversity Conservation Act 1999* (First, Second and Final Reports)' (2011) <http://www.environment.gov.au/epbc/publications/epbc-operations-govt-response.html>.

[80] Jan McDonald, 'Regional Forest (Dis)Agreements: The RFA Process and Sustainable Forest Management' (1999) 11(2) *Bond Law Review* 295, 325 (citations omitted, emphasis added).

[81] *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 137-140.

To address industry complaints regarding burdensome coupe-by-coupe EIA and approval, forestry impacts could be assessed by an EPBC Act strategic assessment, as numerous Australian fisheries have been. Such an assessment, leading to ongoing EPBC approval, would not necessarily be dissimilar in nature to that by which RFAs were developed. But it would be an opportunity to remedy flaws in the RFA process and apply contemporary environmental considerations within the more modern EPBC Act framework, including its principles of ESD. Importantly, going beyond the intergovernmental agreements of the RFAs to apply the greater public participation rights in the EPBC Act would provide the process and Australian forestry with much-needed social licence.

Professor McDonald concluded, inter alia, that the RFA process 'hardly represents a level of scientific certainty high enough to justify a guaranteed right to exploit remaining forests for the next two decades.'[82] Into that second decade, it is high time for Australia to subject the industry's 'guaranteed right to exploit' to the EPBC Act, to properly regulate forestry in Australia's remaining forests.

8.10 Other Key Themes

8.10.1 RFAs v EPBC Act Bilateral Agreements

As flagged in Chapter 2, the EPBC and RFA Acts share similarities in the inter-governmental agreements they use: EPBC Act bilateral agreements for EIA and approval decisions; and RFAs. Their delegations from Commonwealth to State are an application of co-operative environmental federalism, explained in Chapter 2.

Many view the EPBC Act's powers for the Commonwealth to delegate its EIA and, particularly, approval decisions to States through bilateral agreements as the Commonwealth steering away from the international obligations for which it has

[82] Ibid 339-40.

agreed principal responsibility.[83] Hence, the EDO NSW opposed provision for delegation of Commonwealth powers to the States through bilateral agreements from the outset of the EPBC Act:

> the most significant flaw in the Act is that it permits the Commonwealth to delegate its EIA powers to the States … It is extremely disappointing that the Government has not chosen this seminal piece of legislation to make a strong, unambiguous statement about Commonwealth leadership in the environmental field.[84]

The EPBC Act did confine national environmental law leadership to MNES, so delegating EIA and approval powers over them to the States can be seen as the Commonwealth walking away from what remains of its environmental jurisdiction – already a subset of the 'Commonwealth responsibilities' agreed in the IGAE.

Bilateral agreements may enable the Commonwealth to ratchet or harmonise upwards States' environmental procedures. But this depends upon their agreement – only likely if States believe they will gain from the bilateral agreement – and is difficult for the Commonwealth to enforce. The Commonwealth has so far delegated to States only its EIA powers, retaining approval powers. However, since the thesis' submission, the Abbott government has enthusiastically pursued slashing 'green tape', including drafting 'approval bilaterals' to enable 'one-stop-shop' EIA *and* approval of projects by State authorities.

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[83] As agreed by Governments across Australia in Commonwealth of Australia, *Intergovernmental Agreement on the Environment*, 1 May 1992 (a copy of which is set out in the *National Environment Protection Council Act 1994* (Cth) Schedule), ss 2.2.1, Sch 9 cl 10, etc.

[84] Environmental Defenders Office (NSW) (1999), 'EDO NSW Analysis of the Environment Protection and Biodiversity Conservation Act', 7 in Timothy Doyle, *Green Power: The Environment Movement in Australia* (UNSW Press, revised ed, 2001), 12.

There is concern that if EPBC Act approvals are delegated to the States without tight federal controls, or at the very least, strict oversight, then development pressures will prevail in some States (exemplified in the 1980s World Heritage cases).[85] Moreover, government business enterprises (GBEs) can be development proponents, such as Tasmania's HEC which sought to dam the Franklin River,[86] or Forestry Tasmania.[87] Relying on States to approve their GBEs' projects presents clear conflicts of interest.

The push for EPBC Act approvals bilaterals increases the significance of this study, since the RFA regime exemplifies the greatest extent of delegation or devolution by the Commonwealth to the States in Australian co-operative environmental federalism to date. RFAs take that to the furthest extent and lack even the safeguards which the EPBC Act applies to bilateral agreements (inadequate as many consider the safeguards to be). At least EPBC Act 'bilaterals' must conform to guidelines which require a Commonwealth vetting of State approval processes against stated standards before the Commonwealth can agree to their use for Commonwealth purposes. RFAs can be made and varied without the application of such safeguards, as demonstrated by the limitations of the RFA Act (Chapter 3) and the ease with which TRFA cl 68 was varied to produce such a radical legal fiction.

One difference is that EPBC Act bilateral agreements are made under the Act's requirements. Whereas pre-existing RFAs gained elevated legal status from the EPBC Act and particularly RFA Act, with little by way of enforceable environmental safeguards. Nonetheless, the RFA experience is instructive as to risks in EPBC Act 'approval bilaterals' delegating to States the Australian Government's EIA and approval functions over MNES. All the more so since MNES: are Australia's highest

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[85] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'); *Richardson v Forestry Commission* (1988) 164 CLR 261 ('*Tasmanian Forests Case*'); *Queensland v Commonwealth* (1989) 167 CLR 232 ('*Wet Tropics Case*').
[86] *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').
[87] The defendant in the *Wielangta Case* examined in Chapter 6*: Brown v Forestry Tasmania [No 4]* (2006) 157 FCR 1, revd (2007) 167 FCR 34.

legally ranked environmental values; mostly relate to treaty obligations (section 2.5.1.1); and are all that remain of the Commonwealth's environmental approval responsibilities after the EPBC Act consolidated them (section 2.5.1.2).

The experience of RFAs is one reason why current moves towards using EPBC Act bilaterals to delegate / outsource federal EIA and approvals to States for 'one stop shop' decision-making should be critically scrutinised as an environmental risk.

8.10.2 State Forestry Regulation: a Necessary but Not Sufficient Condition for ESFM

State forestry law is essential in regulating and managing forest practices. The States are owners of State forest and have resource management (including forestry) agencies much closest to the action (literally in the EPBC sense of 'action') than are Canberra bureaucrats. However, State regulation alone is inadequate to ensure sufficient, let alone optimal, environmental protection of forest values at a national level, both:

- 'horizontally' across the country and its various forest types, a fact implicitly recognised in the instigation of the RFA (eg CAR reserves) process; and
- 'vertically' in terms of Australia's international environmental obligations.

Following the RFA process, the SOFR justifies RFA exceptionalism by claiming that the RFAs provide equivalent environmental protection to the EPBC Act. This thesis demonstrates that to be inaccurate. It is apparent that the through the regime of RFA exceptionalism, the Commonwealth has largely delegated regulation of forestry to the States.

Reliance on State oversight is problematic for various reasons. Some arise from the extensive control over forestry vested largely in State forestry agencies, certainly in Tasmania where the corporatized but State-owned Forestry Tasmania develops then

implements forestry policy, as well as administering publicly owned State Forest (as noted in Chapter 6). These statutory functions gave it a dominant role in government forestry policy, as well as management, exacerbated in the small State of Tasmania.

RFAs are extremely flexible (having few mandatory, enforceable requirements) and malleable (being variable by agreement between their two parties)). This has political advantages for governments and those in the timber industry, the principal beneficiaries of RFAs. However, it poses governance risks in that abuse of that power can occur unchecked by judicial review. This is because, as the Full Court noted of the TRFA in the *Wielangta Case*,

> satisfactory performance of the State's obligations can only be measured by the parties, the sanction for inadequate performance by the State (in the Commonwealth's opinion) being termination of the agreement …[88]

Hence, once made, RFAs freeze out other third parties such as ENGOs or members of the public, by denying them the capacity to legally enforce RFA provisions (consistent with privity of contract).

So the EPBC and RFA Acts differ in terms of regulatory models and their placement of power: respectively embodying centralist control of matters touching international treaties versus a federalist "States' rights" approach to natural resource management.

8.10.3 Regulatory or Systemic Capture?

The thesis sought to test Australia's compliance with relevant environmental treaties implemented by the EPBC Act, through a doctrinal analysis of the primary obligations they impose, compared with the level of legal protection provided by Australian law, given RFA exceptionalism. Why have successive Australian

[88] *Forestry Tasmania v Brown* (2007) 167 FCR 34, [63].

Governments been willing to countenance breaching international law to the extent the thesis has documented?

Regulatory capture was raised in Chapter 1, then further in Chapter 4. Capture is not confined to political bribery (as Edmund Rouse attempted (Chapter 4)) or other forms of illegal corruption. It can be encouraged more subtly, eg through:

- professional and/or personal connections between employees of the regulator and the regulated (today typically described as a regulator's 'stakeholders');
- 'revolving door' employment practices (eg secondments between organisations); and
- inadequate post-separation employment provisions enabling former Ministers and senior government employees to transition to lucrative positions on company boards, senior management positions or as industry lobbyists.[89]

Various Tasmanian examples spring to mind. In particular, Chapter 7's case study could be extended to apply capture theory to an individual project and company case, perhaps helping to explain the extraordinary legal lengths to which the federal and particularly the Tasmanian Parliament went to pass legislation for Gunns' Limited's pulp mill proposal. At the height of Gunns' power it certainly seemed that a concentrated corporatist culture drove deal-making which saw industry interest trump proper public process, at least in relation the pulp mill assessment. This made Tasmania appear afflicted by elements of the 'resource curse' (more commonly

[89] See eg Michael Briody and Tim Prenzler, 'The Enforcement of Environmental Protection Laws in Queensland: A Case of Regulatory Capture?' (1998) 15(1) *Environmental and Planning Law Journal* 54, who found 'a prima facie case that the [Queensland] Environmental Compliance Division of the Department of Mines and Energy ha[d] been 'captured' by the mining industry': 54.

associated with developing nations such as the Congo), through which natural resource abundance is inversely related to standards of governance.[90]

Beyond that, in the cumulative wake of all thesis case studies, RFA exceptionalism could reasonably be characterised as 'systemic capture'.[91] The outcomes of this thesis suggest that the RFA Act, the TRFA and State law such as that establishing the FPST (on which the RFAs depend for environmental effectiveness), have been subject to systemic capture by the industry.

In the State law context, Chapter 4 examined the FPST, finding that its statutory design features such as over-reliance on self-regulation and delegations, combined with its exemption from the State's environmental and planning laws, results in a model at grave risk of systemic capture. The FPST includes enforcement mechanisms. However, sworn evidence to a Senate Committee by a former Forest Practices Board auditor Bill Manning suggests that, in practice, his efforts to prosecute breaches were stymied by a culture he characterised as cronyism and intimidation, resulting in serious environmental degradation.

This suggests that efforts to apply the FPST to the Tasmanian forest industry have provided insufficient deterrent to alter an entrenched culture in which dominant, and politically well-connected players such as monopoly supplier Forestry Tasmania, and (until its decline) near monopoly purchaser Gunns Limited, were more powerful than the regulators. This could be characterised as regulatory capture (notwithstanding its environmental exemptions, at least the FPST creates some offences (albeit inadequate). The RFA Act however appears be a case of systemic capture of at least

[90] Tom Baxter and Roland Browne, 'Probity Issues Connected with the Tasmanian Pulp Mill' (Paper presented at the Australian Public Sector Anti-Corruption Conference, Brisbane, 28-30 July 2009) <http://www.apsac.com.au/2011conference/2009/2009papers.html> 1.
[91] Ibid.

the Act (this thesis has not explored those within DAFF, beyond their answers to the Senate Committee summarised earlier).

It seems that, having laid the groundwork in the RFA process, the Howard Government effectively procured for the forestry industry and/or State governments (at least in Tasmania) the federal system of forestry regulation through the passage of the RFA Act. The RFA Act is designed to provide the industry with 'resource security', insulating it from the sovereign risk of reduced access to log publicly-owned native forests in the future, at least not without federally funded compensation. The RFA Act entrenches RFA exceptionalism, which has subsequently been buttressed by legal changes to support for the industry such as:

- the insertion of EPBC Act s 75(2B) (discussed in Chapter 7, along with the *Pulp Mill Assessment Act 2007* (Tas)); and

- the February 2007 TRFA variation to stymie Senator Brown's case in *Forestry Tasmania v Brown*[92] (discussed in Chapter 6).

These later chapters demonstrate the legal lengths to which both Tasmanian and Australian Governments have gone to support the regime of RFA exceptionalism. This form of 'systemic capture' could be termed 'legislative capture'. The content of these laws suggest they were drafted in a climate of systemic capture of government (perhaps including elements of its bureaucracy who provided drafting instructions, or they may simply have been following the instructions of their political masters pursuant to the *Public Service Act 1999* (Cth)). Once made, however, laws set the ground rules which the bureaucracy and judiciary are bound to apply.

[92] (2007) 167 FCR 34.

8.10.4 Safeguards Against Systemic Capture?

Given the above risk and evidence of capture, are there over-riding elements of regulatory design (eg independent institutions capable of apolitical decision-making, empowerment of civil society) which may be more important for effective environmental regulation than one's preference for centralism or federalism; or features which could be usefully retrofitted to either governance model?

While States possess far greater on-the-ground forestry expertise than the Commonwealth, the latter has greater independence being larger and a step removed from the conflicts of interest inherent with State-owned corporations managing State forests, for commercial and other purposes, while also driving policy, as did Forestry Tasmania for many years (Chapter 6). It may be that the Australian Government, being larger and further removed than its State counterparts from State owned instrumentalities such as FT, is less likely to succumb to regulatory capture (applying, in the forestry context, the line argument originally put by United States Secretary of State James Madison). However, that alone is no guarantee of independence (the EPBC Act is administered by the federal Environment Minster and his Department, so even when the Act is complied with, many of its discretionary decisions are inevitably influenced by political considerations). It is safest to assume that, at least from time to time, government agencies will be captured by their close relationship with elements of the forestry industry, or by the dictates (or even the *perceived* preferences) of their political masters.

Professor Ross Garnaut recognised the 'natural tendency' for vested interests to capture climate change policy at the expense of national or international (or other) interests. He described good governance as the 'only antidote' to this form of policy capture and specifically described as important in both the national and international spheres the:

- 'articulation of clear and soundly based principles as a foundation for policy'[93] and
- 'establishment of strong, effective and well-resourced institutions to implement these principles'.[94]

The EPBC Act articulates soundly based principles, eg those of ESD, which are also clear (subject to removing their word 'should', as explained earlier).

The second element, 'Establishment of strong, effective and well-resourced institutions to implement these principles' suggests, ideally, a body which also enjoys independence, both:

- statutory (eg under its own Act, reporting to Parliament rather than the Government); and

- financial (eg its own budget allocation, ideally set by Parliament rather than the Government).

8.10.4.1 The Courts

Institutions beyond only the courts are needed if implementation is to be proactive, since they only hear disputes brought before them. Judicial decisions are also open to misinterpretation, with judges reluctant to correct the record. For example, NAFI claimed that the decision of the Full Court in *Forestry Tasmania v Brown,*[95] vindicated the policy of RFA exceptionalism from an environmental perspective: 'The finding also confirms that the RFAs provide adequate protection for forest

[93] Ross Garnaut, *The Garnaut Climate Change Review: Final Report* (Cambridge University Press, 2008), xxix.
[94] Ibid.
[95] (2007) 167 FCR 34.

species and habitats in accordance with the sentiments of the EPBC Act, even where the Act does not directly [apply].'[96]

Even if this were an accurate summary of the Court's reasoning (which would require qualification of 'adequate protection' with a phrase such as 'for the purpose of the TRFA'), it misunderstands the role of the Court. Independent institutions such as the Federal Court are doing their job in applying Parliament's (or in the case of the TRFA variation, the Australian and Tasmanian Governments') intent. The fact that this results in judgments which comprehensively favour industry over the environment does not mean that the courts have been captured (or are breaching the US political question doctrine) or that the laws are appropriate; but simply that the Court would consider it improper judicial activism not to apply laws which unambiguously express clear legislative intent.

8.10.4.2 Statutory Quasi-Judicial Planning Bodies?

Statutory quasi-judicial planning bodies such as the Tasmanian Planning Commission lack judicial independence but (being an executive arm of government rather than judicial) have greater capacity to be proactive than do courts. But Gunns' withdrawal of its project from the (then) RPDC, then resubmission of it to Minister Turnbull without penalty demonstrates weaknesses in both the RFA Act and the TPC's position. Furthermore (and particularly in Gunns' sitation), such bodies generally need proponents, local government, or third parties to bring matters before them. Local government can also experience capture, so more is needed.

[96] National Association of Forest Industries (NAFI), Submission No 133 to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*, December 2008, 3.

8.10.4.3 Empower Third Parties

This thesis suggests that as a counterweight to existing capture (beyond simply additional independent institutions) to start evening a playing field tilted at the behest of powerful industry interests that the safeguard of public participation needs to be entrenched in law. Public participation should extend to empowering third parties to act as surrogate regulators, enforcing the law when regulatory / enforcement agencies fail to do so.[97] This includes breaking down, or at least reducing current barriers to third party enforcement, as summarised in Chapter 6 and earlier in this chapter.

In the RFA forestry context repealing RFA exceptionalism to enable application of the EPBC Act is the best available mechanism to achieve that uniformly (though in Tasmania, removing FPST exemptions from the RMPST would allow application of the latter).

But for those third parties, is litigation the best use of their scarce resources?

8.10.5 Effectiveness of Litigation v Politics in Protecting Forests

Tasmanian Governments have always been strong supporters of resource development, in particular the State's forestry industry. Indeed, as Chapter 5 highlighted, much of Tasmania's resource development has been driven by State Government:

- from the hydro-electric dams and forestry directly undertaken by State-owned instrumentalities such as the HEC and Forestry Commission (both these entities have since been corporatized, as Hydro Tasmania and Forestry Tasmania, but remain fully State-owned);

[97] Neil Gunningham, Martin Phillipson and Peter Grabosky, 'Harnessing Third Parties as Surrogate Regulators: Achieving Environmental Outcomes by Alternative Means' (1999) 8 *Business Strategy and the Environment* 211.

- through to the Wesley Vale and Tamar Valley pulp mill proposals which, while private projects, were actively assisted by the governments of Premiers Gray and Lennon respectively.

Faced with such solid State backing, environmental campaigners have pursued, with mixed success, federal government 'intervention' to protect environmental values of national (eg National Estate, national heritage)[98] or World Heritage[99]) significance.[100]

When the Hawke government intervened in the 1980s to protect World Heritage from recalcitrant States such as Tasmania and Queensland, State Governments challenged what they perceived as federal 'interference' in traditional State control of natural resources. Environmental disputes thereby gave rise to battles in the courts, representing 'some of the most contentious disputes in recent Australian legal history.'[101] The States failed in all three 1980s High Court challenges[102] to the federal Parliament's capacity to assert central authority to implement treaties pursuant to its external affairs power.

This history suggests the ongoing need for federal environmental oversight capacity (as did the national political history chronicled in Chapter 2), as a development-driven State Government can override State based law (see Chapter 7). Tasmania's

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[98] Tom Baxter, 'What Price National Heritage? A call for change' (Paper presented at the Australia New Zealand Society for Ecological Economics Conference, Noosa, 3-6 July 2007) <http://www.anzsee.org/anzsee2007papers/Abstracts/Baxter.Tom.pdf> at 30 August 2009.

[99] Tom Baxter, 'The Tasmanian Wilderness World Heritage Area: Protected by the *Environment Protection and Biodiversity Conservation Act 1999*?' (2008) *Journal of the Australasian Law Teachers Association* 1 (1 & 2) 109.

[100] While this thesis focuses on environmental law, other issues should not be overlooked. For example, gay law reform campaigner Nick Toonen later took successful action under the Optional Protocol to the *International Covenant on Civil and Political Rights*, thereby prompting national legislation to over-ride archaic anti-sodomy provisions of the *Criminal Code Act 1924* (Tas): a fine example of engaging international human rights law to drive change down to the sub-national level.

[101] Lee Godden, 'Preserving Natural Heritage: Nature as Other' (1998) 22 *Melbourne University Law Review* 719 at 733.

[102] Starting with *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Tasmanian Dam Case*) – see Chapters 2 and 5.

history shows that the need for federal oversight extends to forestry, currently prevented by RFA exceptionalism.

Since the 1990s however, the system of forestry regulation has been shaped by more by co-operative federalism, with successive Australian Governments under PM Paul Keating and then PM John Howard returning greater forestry autonomy to the States through the RFA process. The policy of RFA exceptionalism to Australia's environment laws has become entrenched to the extent where the Labor federal governments of PM Kevin Rudd and now PM Julia Gillard have rejected reform recommendations from both a Senate Committee and the inaugural statutory ten-year Independent Review of the EPBC Act by Dr Allan Hawke. Only the Senate Committee suggested a change in the reign of bipartisan political support which both the RFA process and the forestry industry it protects have enjoyed since the 1990s. But the rejection of its recommendations suggests that Labor still feels burned by Mark Latham's attempt to protect 'the mighty Tasmanian forests'. Despite reforms to the forestry regime in Queensland and WA (referenced in Chapter 1),[103] the Tasmanian RFA regime has enjoyed bipartisan support regardless of which party was in power at state or federal level.

The thesis' case studies included ongoing efforts by third parties (eg ENGOs and environmental champions such as Bob Brown) to mitigate the extent of damage wrought by forestry to matters of national environmental significance. These efforts have included legal challenges, but the TRFA system is far from a level legal playing field. Both the Wielangta Case, and pulp mill have seen the TRFA, EPBC Act and State legislation amended to stymie such environmental litigation, in favour of forestry. Consequently third party legal challenges to the TRFA regime have been

[103] See AJ Brown, 'Beyond Public Native Forest Logging: National Forest Policy and Regional Forest Agreements after South East Queensland' (2001) 18 *Environmental and Planning Law Journal* 189 and P Horwitz and M Calver, 'Credible Science? Evaluating the Regional Forest Agreement Process in Western Australia' (1998) 5(March) *Australian Journal of Environmental Management* 213.

few and (except for Marshall J's trial judgment in the Wielangta Case) largely unsuccessful. The policy of RFA exceptionalism is deeply embedded in both the RFA Act and EPBC Act. When the FT's practices were found wanting by Marshall J, the Premier Lennon and PM Howard moved rapidly to shore up the TRFA by deeming endangered species to be protected in fact.

8.10.6 Law Enforcement

8.10.6.1 Government Enforcement

This thesis focuses on analysis of the statutory regime, more so than its administration. However, the lack of a Commonwealth EPA or Commonwealth 'environmental police' on the ground in States such as Tasmania, combined with cuts to the federal Environment Department in Canberra, drastically undermines its capacity to effectively administer, let alone enforce compliance of, the EPBC Act. It would be possible for the Commonwealth to accredit State officers (eg officers of the Forest Practices Authority) as inspectors under the EPBC Act, thereby empowering them to apply the EPBC Act to forestry operations likely to impact MNES. Similar arrangements are in place whereby the Great Barrier Reef Marine Park Authority appoints as inspectors under its Act certain officers in Queensland agencies (eg the marine police, Queensland Boating and Fisheries Patrol, and Queensland Parks and Wildlife Service).

8.10.6.2 Third Party Enforcement – Legal

It follows from the systemic defects identified in the current regulatory regime that remedying these flaws should (for reasons of efficiency and effectiveness), in addition to strengthening the substantive content of environmental law, also include procedural measures to empower such third parties to enforce the law, including in relation to forestry. This could be effective in Tasmania which contains an active ENGO movement focussed on forestry. Law reform enabling them (or other third

parties) to transform from would-be regulators to 'surrogate regulators'[104] could harness their environmental commitment to extend beyond the roundtable political process (currently taking place in Tasmania) to the regulatory realm, where they could enforce environmental law when governments are unwilling to do so.

Furthermore, a key advantage of applying the EPBC Act is that it includes ready-made third party enforcement mechanisms, should government agencies (eg due to regulatory capture) fail to adequately police and/or enforce the EPBC Act.

This would be a necessary condition to fulfil Australia's international obligations. However, it would not necessarily be a sufficient condition to achieve this result due to inadequacies in the EPBC Act. Some of those inadequacies relevantly identified in thesis are summarised below.

8.10.6.3 Third Party Enforcement - Market Mechanisms (eg FSC)

As explained in Chapter 4 (section 4.2.2), Prof Gunningham and Sinclair extend the Prof Braithwaite 'enforcement pyramid' to allow escalation 'up any face of the pyramid, including the second face (through self-regulation), or the third face (through a variety of actions by commercial or non-commercial third parties or both), in addition to government action.'[105]

They then specifically illustrate using Forest Stewardship Council (FSC) certification, which has since become an extremely important, third party based, component of the contemporary Tasmanian forestry debate:

> To give a concrete example of escalation up the third face, the developing Forest Stewardship Council (FSC) is a global environmental standards setting system for forest products. The FSC will both establish standards

[104] Gunningham, Phillipson and Grabosky, above n 97.
[105] Neil Gunningham and Darren Sinclair, 'Designing Smart Regulation' in B Hutter (ed), *The Environmental Regulation Reader* (Oxford University Press, 1999) , 6.

> that can be used to certify forestry products as sustainably managed and will "certify the certifiers". Once operational, it will rely for its "clout" on changing consumer demand and upon creating strong "buyers groups" and other mechanisms for institutionalising green consumer demand. That is, its success will depend very largely on influencing consumer demand. While government involvement, for example through formal endorsement or though government procurement policies which supported the FSC, would be valuable, the scheme is essentially a free standing one: from base to peak (consumer sanctions and boycotts) the scheme is entirely third party based. In this way, a "new institutional system for global environmental standard setting" will come about, entirely independent of government. [106]

RFA exceptionalism (Ch 3) freezes third parties out of EPBC Act third party law enforcement. Meanwhile under Tasmanian law FPST exemptions from the RMPS have a similar effect (Ch 4). These exclusionary regimes could be viewed as traditional or even naïve models of resource-based regulation. However, compared to and (at least in the EPBC Act) contained in contemporary environmental law (which recognises third parties through relatively open standing), they can reasonably be classified as regulatory capture of the respective federal and State legal regimes.

Denied third party / public participation rights in law enforcement for forestry, Tasmanian ENGOs responded in two main ways. Forest activists and informal forest protest groups pursued forest protests (despite some serving lengthening prison terms for breaking increasingly stringent forestry trespass laws). Other ENGOs sought to escalate the role of FSC certification, long denied to Forestry Tasmania. ENGOs such as ‘Markets for Change’ have taken their campaign to key customers for Tasmanian forestry products (eg in Japan and elsewhere), successfully persuading many of them to demand Forest Stewardship Council (FSC) chain of custody certification from their suppliers.[107]

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[106] Ibid 6.
[107] See, eg, Tom Baxter, 'Logging World Heritage Listed Forests: Unlawful and Uneconomic' (2013) (3) *National Environmental Law Review* 55 <http://www.pams.com.au/demo/StaticContent/Images/NELA/NELR_2013_Issue_3.pdf>.

Gunns Limited recognised the need for change, when lack of 'social licence'[108] prevented it securing finance for its Tamar Valley pulp mill. Following Gunns' unsuccessful SLAPP suit against the 'Gunns 20', the company concluded that (despite legal challenges to its Tamar Valley pulp mill failing), FSC certification was a necessary (albeit not sufficient) condition for it to obtain finance for its mill. Gunns' resultant exit from native forest logging in favour of plantations, and subsequent sale of its Triabunna wood chip mill to two environmental philanthropists, saw representatives of nearly all elements of the Tasmanian forest industry and the Forestry Division of the CFMEU sit down with three of the more 'mainstream' ENGOs to negotiate through a 'roundtable' process. Each of these ENGOs (comprising the ACF, Environment Tasmania and The Wilderness Society) have, in the past brought significant legal applications against government, albeit unsuccessfully.[109] Having lost in the courts, it appears the ENGOs have succeeded in obtaining talks with industry groups only after market-based campaigns and Gunns exit from native forests brought industry to the negotiating table.

Hence, while FSC certification's application in Tasmania is an unfinished story (and an area for further research largely beyond the scope of this legal thesis), it may prove (as 'surrogate regulation') the most effective antidote to the regulatory or even systemic capture of federal and State forestry law regimes this thesis suggests has occurred.

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[108] Hawke, above n 24, 39-40.

[109] *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; *The Wilderness Society Inc v Minister for the Environment and Water Resources* (2007) 166 FCR 154; *Landon-Lane v Minister for Economic Development and Tourism* (2009) 170 LGERA 124. Environment Tasmania and The Wilderness Society were thwarted by State and Commonwealth laws respectively facilitating Gunns' pulp mill proposal. Their cases are discussed in Chapter 7.

8.11 Areas for Further Research

8.11.1 Third Party Certification Schemes, eg FSC

The role of Forest Stewardship Council (FSC) certification and market based campaigns described above are otherwise beyond the legal scope of this thesis, but certainly warrant further study, including in the Tasmanian context.

Other areas for further research, beyond the scope of this thesis but which it suggests warrant further study, include the following.

8.11.2 ENGO-Industry Forest Agreements

Similarly, beyond the scope of this thesis but deserving academic analysis (including comparative) are the industry-ENGO Roundtable talks in Tasmania which led to a 'Statement of Principles' then the subsequent Tasmanian Forests Agreement and *Tasmanian Forests Agreement Act 2013* (Tas).[110] This process proved a more inclusive model for many stakeholders groups than had that for the intergovernmental RFAs. But the TFA process was resisted by many 'outside the tent', particularly the Liberal Party – as had Minister Wilson Tuckey rejected the South East Queensland Forest Agreement explained in Chapter 1.[111] Accordingly, comparative analysis with the process and outcome of the South East Queensland Forest Agreement would be logical. Comparative analysis with jurisdictions such as Canada could also be fruitful in this regard – and at the level of federal forestry regulation.

[110] See, eg, Baxter, above n 107.
[111] Brown, above n 103.

8.11.3 Comparative Research Between Nations

While beyond the scope of this thesis, it would be interesting and worthwhile to compare and contrast Australian environmental and forestry regulation with equivalent legal regimes in other nations. Since Australia's federal system of government is the basis for its RFA regime, the most valuable lessons would likely be drawn from comparative analysis of other federal jurisdictions, eg the US and its states and/or Canada and its provinces. Such analysis could also potentially provide instructive case studies, possibly comparable to some of those in this thesis. For example, impacts of forestry operations in the Pacific North West on threatened species such as the spotted owl and bald eagle have led to legal disputes which could provide useful points of avian legal comparison with the endangered swift parrot and wedge-tailed eagle, the most prominent subjects of the *Wielangta Case* litigation.

8.11.4 Forest Carbon Law and Carbon Accounting

Given the focus of this thesis, it does not delve into forest carbon, nor the challenges of accounting for it. However, another *potential* contemporary reason for a Commonwealth role in protection and management of forests is their role as carbon sinks, and hence potential to impact Australia's international obligations under the UNFCCC. While forest carbon is a contested field, in May 2011 Australia's Climate Commission found protecting carbon dense native forests to be one of the nation's best methods to rapidly reduce Australia's greenhouse gas emissions.[112]

Australia's role in emerging forest carbon legal regimes will be driven by the Commonwealth, rather than States. The RFA Act does not expressly include carbon sequestration. The addition of an interim carbon trigger to EPBC Act was Dr Hawke's other recommendation which he described as 'summarily' rejected by the

[112] Climate Commission, 'The Critical Decade: Climate Science, Risks and Responses' (Commonwealth of Australia, 2011), 57-8.

government when it released his report. The urgent need to rapidly reduce greenhouse gas emissions, and potential resultant economic opportunities suggest that the climate impacts of broad-scale clearfell, burn and sow (CBS) forestry carried out across Tasmania over recent decades warrant independent studied from a climate change perspective. The emerging carbon-constrained economy may also provide alternative opportunities for forests such as Tasmania's with their enormous capacity to sequester carbon. These areas provide many useful topics for further research.

8.12 Conclusion

Forest protection requires:

(a) a CAR Reserve System (as the RFAs envisaged, albeit that Profs McDonald and Kirkpatrick argue it was not properly implemented – a view which the June 2013 TWWHA forest extension listing supports); plus

(b) enforceable off-reserve conservation mechanisms to ensure that forestry does not unduly impact MNES (eg World Heritage and threatened species).

This is analogous in a fishing context to:

(a) marine protected areas (MPAs) (where the Commonwealth is also pursuing a CAR system);[113] plus

(b) fisheries management mechanisms for fishing outside no-take MPAs.

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[113] See eg Australian and New Zealand Environment and Conservation Council (ANZECC) Task Force on Marine Protected Areas, 'Understanding and Applying the Principles of Comprehensiveness, Adequacy and Representativeness for the NRSMPA, Version 3.1' (Report prepared by the Action Team for the ANZECC Task Force on Marine Protected Areas, Marine Group, Environment Australia (now the Department of Sustainability, Environment, Water, Population and Communities), Australian Government, November 1999) <http://www.environment.gov.au/coasts/mpa/publications/nrsmpa-principles.html> and the Representative Areas Program producing the *Great Barrier Reef Marine Park Zoning Plan 2003* (Cth).

The TRFA envisaged:

(a) a CAR reserve system; plus

(b) management prescriptions pursuant to State forest practices systems.

But the *Wielangta Case* make it very difficult to see how the Commonwealth (let alone a third party) can enforce management prescriptions to ensure forestry does not further damage endangered species.

Then the TRFA cl 68 variation to deem threatened species protected makes a bad situation worse, as illustrated by DAFF's answers to the Senate Committee, earlier. This undermines the Commonwealth's capacity to (fulfil its responsibility to) ensure Australia meets its environmental treaty obligations, which Australia is currently breaching.

Repealing RFA exceptionalism to apply the EPBC Act to forestry would require EPBC Act approval for significant impacts by forestry operations on the matter protected by Pt 3 of the EPBC Act, eg:

(a) the world heritage values of those parts of the reserve system in a declared World Heritage property;

(b) the National Heritage values of those limited parts of the reserve system in a National Heritage place (eg Recherche Bay in Tasmania); and

(c) EPBC listed threatened species or listed threatened ecological communities.

Repealing EPBC Act s 38 and RFA Act s 6(4) would require forestry operations significantly impacting a MNES to be approved under the EPBC Act, irrespective of their compliance with an RFA. This method of regulation has the best chance of achieving environmental protection given the:

- flexible legal requirements to constitute an RFA (as held by the Full Court in the *Wielangta Case*);
- inadequacy of at least the TRFA as a method of environmental regulation;
- susceptibility of RFAs to political variation (as in the *Wielangta Case*); and
- greater prospects of successfully enforcing of a single regime (ie the EPBC Act), rather than one which mixes the EPBC Act and RFA Act, for both:
    - a federal Environment Department (given departmental silos); and
    - a third party, eg ENGO (the challenges of taking on the two separate statutory regimes are illustrated by the *Wielangta Case*).

The trigger for EPBC Act regulation of forestry would be the likelihood of a significant impact on a MNES (as for all other industries), rather than the current test of non-compliance with a malleable RFA. This would help level the regulatory playing field across all industry sectors.

Machiavelli's timeless insights at the start of this chapter suggest that law reform is no easy task – particularly when existing industry players 'have the laws on their side' and hence, will fight 'like partisans' to resist challenges to their vested interests. All the more difficult is environmental law reform since, as Kermit the frog famously sang, 'It's not easy being green.' Nevertheless, as PM Malcolm Fraser once noted, 'Life wasn't meant to be easy.' The impacts of RFA exceptionalism identified in this thesis make its repeal to apply the EPBC Act a necessary legal reform, and hence, a political challenge worth pursuing.

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Appendix: Selected Statutory Provisions and Maps

- **EPBC Act ss 38-42, 75(2B)**
- **RFA Act s 6, extracts of s 4**
- ***Pulp Mill Assessment Act 2007* (Tas) s11**

EPBC Act ss 38-42:

Division 4 — Forestry operations in certain regions

Subdivision A — Regions covered by regional forest agreements

38 Part 3 not to apply to certain RFA forestry operations

(1) Part 3 does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

(2) In this Division:

RFA or ***regional forest agreement*** has the same meaning as in the *Regional Forest Agreements Act 2002*.

RFA forestry operation has the same meaning as in the *Regional Forest Agreements Act 2002*.

Note: This section does not apply to some RFA forestry operations. See section 42.

Subdivision B — Regions subject to a process of negotiating a regional forest agreement

39 Object of this Subdivision

The purpose of this Subdivision is to ensure that an approval under Part 9 is not required for forestry operations in a region for which a process (involving the conduct of a comprehensive regional assessment, assessment under the *Environment Protection (Impact of Proposals) Act 1974* and protection of the environment through agreements between the Commonwealth and the relevant State and conditions on licences for the export of wood chips) of developing and negotiating a regional forest agreement is being, or has been, carried on.

40 Forestry operations in regions not yet covered by regional forest agreements

(1) A person may undertake forestry operations in an RFA region in a State or Territory without approval under Part 9 for the purposes of a provision of Part 3 if there is not a regional forest agreement in force for any of the region.

Note 1: This section does not apply to some forestry operations. See section 42.

Note 2: The process of making a regional forest agreement is subject to assessment under the *Environment Protection (Impact of Proposals) Act 1974*, as continued by the *Environmental Reform (Consequential Provisions) Act 1999*.

(2) In this Division:

forestry operations means any of the following done for commercial purposes:

(a) the planting of trees;

(b) the managing of trees before they are harvested;

(c) the harvesting of forest products;

and includes any related land clearing, land preparation and regeneration (including burning) and transport operations. For the purposes of paragraph (c), ***forest products*** means live or dead trees, ferns or shrubs, or parts thereof.

RFA region has the meaning given by section 41.

(3) Subsection (1) does not operate in relation to an RFA region that is the subject of a declaration in force under this section.

(4) The Minister may declare in writing that subsection (1) does not apply to an RFA region.

(5) A declaration is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

(6) The Minister must not make a declaration that has the effect of giving preference (within the meaning of section 99 of the Constitution) to one State or part of a State over another State or part of a State, in relation to the taking of the action:

(a) by a person for the purposes of trade or commerce between Australia and another country or between 2 States; or

(b) by a constitutional corporation.

41 What is an *RFA region*?

Regions that are RFA regions

(1) Each of the following is an ***RFA region***:

(a) the area delineated as the Eden RFA Region on the map of that New South Wales Region dated 13 May 1999 and published by the Bureau of Resource Sciences;

(b) the area delineated as the Lower North East RFA Region on the map of that New South Wales Region dated 13 May 1999 and published by the Bureau of Resource Sciences;

(c) the area delineated as the Upper North East RFA Region on the map of that New South Wales Region dated 13 May 1999 and published by the Bureau of Resource Sciences;

(d) the area delineated as the South Region on the map of the Comprehensive Regional Assessment South CRA Region dated August 1997 and published by the State Forests GIS Branch of the organisation known as State Forests of New South Wales;

(e) the area delineated as the Gippsland Region in the map of that Region dated 11 March 1998 and published by the Forest Information Section of the Department of Natural Resources and Environment of Victoria;

(f) the area delineated as the North East RFA Region in the map of that Region dated 11 March 1998 and published by the Forest Information Section of the Department of Natural Resources and Environment of Victoria;

(g) the area delineated as the West Region in the map of that Region dated 3 March 1999 and published by the Forest Information Section of the Department of Natural Resources and Environment of Victoria;

(h) the area delineated as the South East Queensland RFA Region on the map of that Region dated 21 August 1998 and published by the Bureau of Resource Sciences.

Regulations may amend list of regions

(2) The regulations may amend subsection (1).

Prerequisites for prescribing RFA regions

(3) Before the Governor-General makes regulations amending subsection (1), the Minister must be satisfied that the proposed regulations, in conjunction with this Subdivision, will not give preference (within the meaning of section 99 of the Constitution) to one State or part of a State over another State or part of a State.

Subdivision C — Limits on application

42 This Division does not apply to some forestry operations

Subdivisions A and B of this Division, and subsection 6(4) of the *Regional Forest Agreements Act 2002*, do not apply to RFA forestry operations, or to forestry operations, that are:

(a) in a property included in the World Heritage List; or

(b) in a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention; or

(c) incidental to another action whose primary purpose does not relate to forestry.

EPBC Act s 75(2B):

75 Does the proposed action need approval?

Is the action a controlled action?

(1) The Minister must decide:

(a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and

(b) which provisions of Part 3 (if any) are controlling provisions for the action.

Note: The Minister may revoke a decision made under subsection (1) about an action and substitute a new decision. See section 78.

….

Considerations in decision

(2) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:

(a) the Minister must consider all adverse impacts (if any) the action:

(i) has or will have; or

(ii) is likely to have;

on the matter protected by each provision of Part 3; and

(b) must not consider any beneficial impacts the action:

(i) has or will have; or

(ii) is likely to have;

on the matter protected by each provision of Part 3.

Note: *Impact* is defined in section 527E.

….

(2B) Without otherwise limiting any adverse impacts that the Minister must consider under paragraph (2)(a), *the Minister must not consider any adverse impacts of*:

(a) *any RFA forestry operation* to which, under Division 4 of Part 4, Part 3 does not apply; or

(b) *any forestry operations in an RFA region* that may, under Division 4 of Part 4, be undertaken without approval under Part 9.

RFA Act s 6 and Extracts of s 4:

6 Certain Commonwealth Acts not to apply in relation to RFA wood or RFA forestry operations

(1) RFA wood is not prescribed goods for the purposes of the *Export Control Act 1982*.

Note: The *Export Control Act 1982* regulates the export of "prescribed goods".

(2) An export control law does not apply to RFA wood unless it expressly refers to RFA wood. For this purpose, ***export control law*** means a provision of a law of the Commonwealth (other than the *Export Control Act 1982*) that prohibits or restricts exports, or has the effect of prohibiting or restricting exports.

(3) [repealed]

(4) Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* does not apply to an RFA forestry operation that is undertaken in accordance with an RFA.

Note: This subsection does not apply to some RFA forestry operations. See section 42 of the *Environment Protection and Biodiversity Conservation Act 1999*.

4 Definitions

In this Act, unless the contrary intention appears:

comprehensive, adequate and representative reserve system, in relation to an RFA, has the same meaning as in the RFA.

…

RFA or ***Regional Forest Agreement*** means an agreement that is in force between the Commonwealth and a State in respect of a region or regions, being an agreement that satisfies all the following conditions:

(a) the agreement was entered into having regard to assessments of the following matters that are relevant to the region or regions:

(i) environmental values, including old growth, wilderness, endangered species, national estate values and world heritage values;

(ii) indigenous heritage values;

(iii) economic values of forested areas and forest industries;

(iv) social values (including community needs);

(v) principles of ecologically sustainable management;

(b) the agreement provides for a comprehensive, adequate and representative reserve system;

(c) the agreement provides for the ecologically sustainable management and use of forested areas in the region or regions;

(d) the agreement is expressed to be for the purpose of providing long-term stability of forests and forest industries;

(e) the agreement is expressed to be a Regional Forest Agreement.

RFA forestry operations means:

(a) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and New South Wales) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA); or

(b) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Victoria) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA); or

(c) harvesting and regeneration operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Western Australia) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA); or

(d) forestry operations (as defined by an RFA as in force on 1 September 2001 between the Commonwealth and Tasmania) that are conducted in relation to land in a region covered by the RFA (being land where those operations are not prohibited by the RFA).

For the purposes of paragraph (b), the East Gippsland RFA (as in force on 1 September 2001) is taken to include a definition of ***forestry operations*** that is identical to the definition of ***forestry operations*** in the Central Highlands RFA (as in force on 1 September 2001).

> ***RFA wood*** means processed or unprocessed wood (including woodchips) sourced from a region covered by an RFA, but does not include wood sourced from a plantation in a State unless:
>
> (a) a code of practice for that State has been approved under regulation 4B of the Export Control (Unprocessed Wood) Regulations; and
>
> (b) that approval has not been revoked under regulation 4C of those regulations.

Pulp Mill Assessment Act 2007 (Tas) s11:

11. Limitation of rights of appeal

(1) Subject to subsection (3) and notwithstanding the provisions of any other Act –

(a) a person is not entitled to appeal to a body or other person, court or tribunal; or

(b) no order or review may be made under the *Judicial Review Act 2000*; or

(c) no declaratory judgment may be given; or

(d) no other action or proceeding may be brought –

in respect of any action, decision, process, matter or thing arising out of or relating to any assessment or approval of the project under this Act.

(2) For the purposes of subsection (1), "any action, decision, process, matter or thing arising out of or relating to any assessment or approval of the project under this Act" includes any action, decision, process, matter or thing arising out of or relating to a condition of the Pulp Mill Permit requiring that the person proposing the project apply for such other permits, licences or other approvals as may be necessary for the project.

(3) Subsection (1) does not apply to any action, decision, process, matter or thing which has involved or has been affected by criminal conduct.

(4) No review under subsection (3) operates to delay the issue of the Pulp Mill Permit or any action authorised by that permit.

Maps of RFA Regions [see EPBC Act s 41 above]:

Maps of RFA Regions (DAFF) <http://www.daff.gov.au/forestry/policies/rfa>

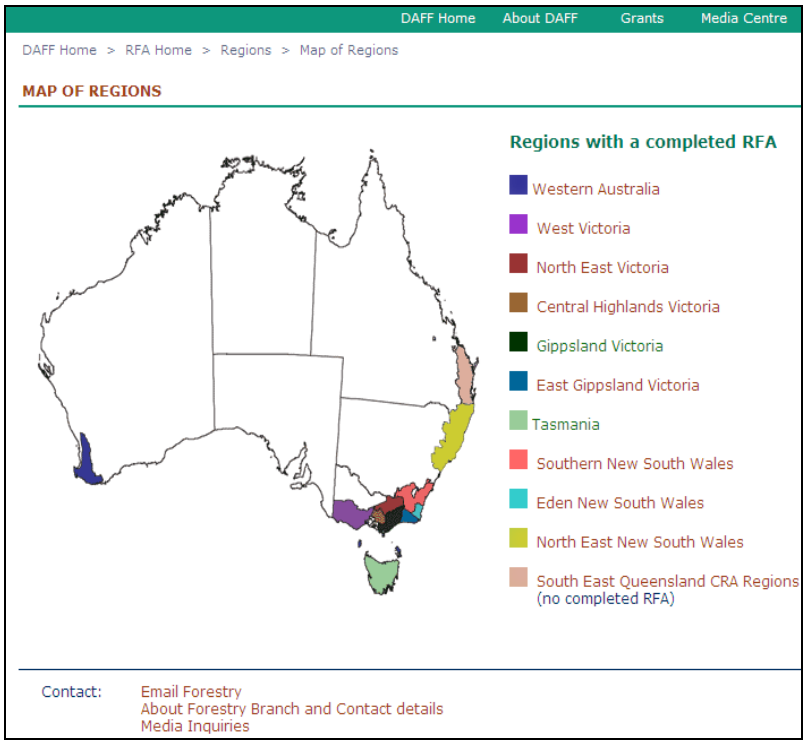

Figure A1 – 'Map of [RFA] Regions'

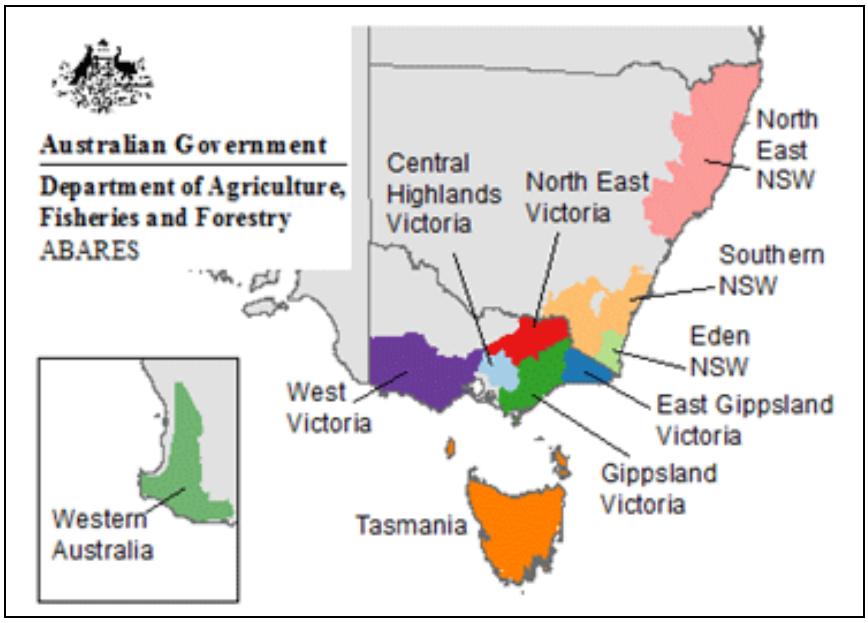

Figure A2 – RFA 'Regions with a Completed RFA' ie not SE Queensland]

Legal Definitions:

Many of the terms used in statutes and treaties, and hence in this thesis, have a legal definition. For example, the EBPC Act's Chapter 8 defines, in alphabetical order, numerous words and phrases used in that Act, including cross-references to some other sections of the Act which contain definitions. Similarly, the RFA Act sets out various definitions in its interpretation section.[1]

Where words or phrases used in the thesis have a relevant legal meaning then, unless the contrary intention appears, their meaning is that given by the following sources, in order of highest (i) to lowest (iv) priority and precedence:

i. a footnote, if one immediately follows the term or its first use in the thesis or relevant chapter;

ii. the table of Acronyms and Abbreviations at the start of the thesis;

iii. the RFA Act meaning, generally set out (or cross-referenced) in RFA Act s 4.

iv. the earlier EPBC Act meaning, generally set out (or cross-referenced) in EPBC Act Ch 8 'Definitions' ss 523-528;

To reduce repetition these definitions are not footnoted each time a defined phrase or 'word of art' is employed; only when its definition is considered necessary.

[1] *Regional Forest Agreement Act 2002* (Cth) s 4.

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